

Hertz or Avis? Progressives' Quest to Reclaim the Constitution and the Courts

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I. INTRODUCTION AND SUMMARY

For some years after modern American conservative jurisprudence first took shape in the 1970s and 1980s, both its proponents and its progressive opponents acted as if progressives were Hertz and conservatives Avis. Conservatives tried harder. Progressives took for granted their established dominance of the arenas (judicial, political, and academic), and, especially, the terms of constitutional debate. Not until around the turn of the twenty-first century did progressives begin to acknowledge the seriousness of the intellectual challenge from the right and to conjure strategies for responding. As a spear-carrier in the Washington wars over the courts, I have participated in this search for ways to argue about the Constitution and the courts that can be persuasive in litigation as well as in political and public opinion arenas. In major respects, these advocacy initiatives have been indispensably enriched by the parallel, creative rethinking in process among progressive academics. Now more than ever, progressive advocates need research and theory to handle a rapidly shifting landscape of opportunities and, especially, threats. But increasingly, the needs of progressive advocacy are not well served by continued preoccupation with what the academic debate has mainly been about: focus on supposedly “conservative” versus “progressive” methods of constitutional interpretation—“originalism” versus the “living constitution,” and their respective revisions and refinements.

Progressive advocates—including, importantly, politicians and judges—need strategies that accommodate five defining circumstances that currently structure the politics of the courts and the Constitution:

First, to be credible with the majority of the electorate, arguments about the Constitution, the law, or courts and judges must be couched in terms harmonious with the civics class canon that guides most Americans’ (and most judges’) expectations:

- Judges sit to apply law, not their own ideological preferences.
- In the first instance, the law is the actual words of the applicable statute, regulation, decision, or constitutional provision.
- The original meaning of legal text is important in interpreting how to apply the words to contemporary circumstances, though other factors are also important, such as precedent and the practical consequences of alternative interpretations.

- Courts should show restraint and respect to legislatures, presidents, and governors, who are democratically elected and responsible for making policy and law.

Second, the politics of judicial nominations has been driven by a chronic structural asymmetry that has favored the right. Social conservative voters place a high enough priority on the federal courts to make credible to politicians the threat that their votes could turn on that issue. In contrast, electoral constituencies important to Democratic and moderate Republican candidates give much lower priority to the courts. In a May 21, 2008, Rasmussen poll, thirty percent of Republican respondents picked Supreme Court appointments as the most important issue in their choice of a presidential candidate (more than selected the Iraq war), compared with only seven percent of Democrats.¹ While researching the 2005 Senate struggles over President George W. Bush's two (actually three) Supreme Court nominations, I was told by the chief of staff to one prominent red-state Democrat, "You'd be shocked at how many voters in our state say that the Supreme Court is their highest priority issue." He was not talking about moderate or liberal voters. Moderate independent and Democratic voters, most of whom are more concerned about pocketbook issues than culture war issues, have not seen the courts as important to their priority interests. This structural imbalance is why, for much of the past two decades, Democratic politicians have been tongue-tied when confronted with questions about the Constitution and the courts—"flummoxed by anxiety that anything they say will displease either court-focused liberal advocacy groups [with relatively little electoral clout] or critical cultural conservative and independent . . . constituencies."² Contrariwise, because a major bloc of Republican voters make the courts a priority, so do Republican politicians; that is why the Reagan Administration consciously seeded the courts of appeals with committed and highly capable conservative nominees, why its Justice Department devoted resources to generating a roadmap for rightward constitutional change, and why President George W. Bush from the outset moved aggressively to showcase and to fight for confirmation of provocatively conservative judicial nominees.³

¹ See *For Republicans, Judicial Appointments Matter More than Iraq*, RASMUSSEN REP. (May 21, 2008), http://www.rasmussenreports.com/public_content/politics/elections/election_2008/2008_presidential_election/for_republicans_judicial_appointments_matter_more_than_iraq.

² Doug Kendall & Simon Lazarus, *The Next War over the Courts*, AM. PROSPECT, May 2009, at 30, 33, available at http://prospect.org/cs/articles?article=the_next_war_over_the_courts.

³ See, e.g., Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (detailing reports produced by Reagan's Justice Department specifying existing Supreme Court precedents considered by the authors to have been wrongly decided, and outlining the direction of corrective decisions). On May 11, 2001, in an unprecedented move to highlight his political investment in judicial nominations, President Bush introduced his first eleven appellate nominees to the media as a group in person. Neil A. Lewis, *Bush to*

Third, the composition of the federal judiciary has a pronounced right-of-center tilt, which is likely to persist for the foreseeable future. Even if President Obama wins a second term, the chances appear better than even that all five members of the current Republican majority will be on the Court when his successor takes office in January 2017. During his first two years in office, with a 60–40 Democratic majority in the Senate, Obama was able to moderate the substantial Republican imbalance at the federal appellate level left by President George W. Bush. In January 2009, nine of the thirteen circuits had Republican majorities, two were even, and two (the Second and Ninth) had Democratic majorities. Two and one-half years later, Democrats held majorities on three additional circuits (the Third, Fourth, and Federal) and the circuits on which Republicans outnumbered Democrats had shrunk from nine to seven.⁴ But of course, going forward, Obama has a much slimmer Democratic Senate majority in the current Congress. In 2012, the chances appear better than even that Republicans will win the Senate. In sum, any progressive agenda aimed at achieving actual outcomes in the federal judiciary will have to (a) focus significantly on preserving established principles and precedents essential for important progressive priorities, and (b) attempt, where possible, to frame issues in terms that resonate with some members of the conservative majorities on the judiciary, and especially, of course, on the Supreme Court.

Fourth, in the last year, conservatives have, at least for the moment, shifted sharply rightward the thrust of their constitutional agenda and intensified the aggressiveness with which they are pursuing it. They are no longer attacking only, or mainly, the Warren Court, and incanting that “activist” justices will create new “rights” important mainly to minorities or liberal “elites.” The health reform challenges take dead aim at the New Deal/*Carolene Products* footnote four regime of judicial deference to legislatures on economic and social regulation.⁵ Mirroring the Tea Party insurrection within Republican political ranks, libertarian legal theorists and advocates, who had been marginalized for over a quarter century, have seized control of the conservative and Republican constitutional agendas. Leading Republican politicians are emphasizing the need for courts that will check “government overreach” (code for alleged

Nominate 11 to Judgeships Today, N.Y. TIMES, May 9, 2001, at A24, available at <http://www.nytimes.com/2001/05/09/us/bush-to-nominate-11-to-judgeships-today.html>.

High-decibel nomination struggles continued for the duration of Bush’s two White House terms.

⁴ Russell Wheeler, *Judicial Nominations and Confirmations in the 111th Senate and What to Look for in the 112th*, BROOKINGS INST., 10–11 (Jan. 4, 2011), http://www.brookings.edu/~media/Files/rc/papers/2011/0104_judicial_nominations_wheeler/0104_judicial_nominations_wheeler.pdf.

⁵ See *United States v. Carolene Products Co.*, 304 U.S. at 152 n.4 (1938), in which the Court famously prescribed that “regulatory legislation . . . is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators,” or where the legislation violates individual rights that are “fundamental” under substantive due process analysis, or protected by other constitutional provisions.

expansions of federal power by the 111th Congress, in particular the Patient Protection and Affordable Care Act (Affordable Care Act or ACA)), as much or more than the old need to check judicial "activism" (code for Warren-Burger Court individual rights decisions, in particular *Roe v. Wade*).

Fifth, moving in tandem with their right-shifted political allies, conservative court-focused advocates (including movement conservative politicians and judges) level new, *potentially existential*, threats to progressive values, governance, and political viability (e.g., the new libertarian drive to reinstate pre-New Deal constitutional barriers to economic regulatory legislation, a la *Lochner v. New York* and its progeny,⁶ the Tea Party's campaign to curtail birthright citizenship, efforts to hamstring federal authority over and obstruct individual enforceability of benefit entitlements, Republican determination to disenfranchise progressive constituencies, conservative politicians' and judges' increasingly bold ambitions for stretching the First Amendment to entrench corporate political power).

All of the above features of the current state of constitutional conflict militate in favor of progressives' turning away from arguing about how to argue about what the Constitution means and turning toward arguing directly why the Constitution supports progressive positions on the major issues of the day. Even viewed on its own terms, the long-running academic debate about interpretive methodology appears to have little if any substance left to it, as University of Virginia Law Professor Jim Ryan chronicles.⁷ Substantially all progressive academics and, indeed, substantially all conservative academics now commonly acknowledge (1) that the initial, "original intent" or "expectations" version of originalism is untenable; (2) that, on the other hand, text and "original meaning"

⁶*Lochner v. New York*, 198 U.S. 45 (1905), in which a 5–4 majority held that maximum hours legislation violated a principle of "freedom of contract," resident in the Fifth and Fourteenth Amendments' prohibition on governmental deprivation of "liberty" without "due process of law," launched and gave its name to the "*Lochner* Era." See *id.* at 64. During this 30-year period, the Supreme Court applied this muscular concept of "substantive due process," as well as other envelope-pushing doctrinal inventions, to block state and federal economic regulatory legislation. "*Lochnerism*" was repudiated by Supreme Court decisions in 1937 through the early 1940s, and replaced by the principles of judicial restraint and deference famously articulated in footnote four of the *Carolene Products* decision. See 304 U.S. at 152 n.4. Footnote four and its condemnation of *Lochnerian* activism was a staple of mainstream conservative jurisprudence, in conflict with libertarian jurisprudence. See, e.g., STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1986), which contains chapters titled "The Framers of the Constitution v. Judge Bork," "The Majoritarian Myth," and "Principled Judicial Activism." The history of conflict between libertarian and mainstream conservative legal thought leaders is elaborated in Damon W. Root, *Conservatives v. Libertarians: The Debate over Judicial Activism Divides Former Allies*, REASON, July 2010, at 25. See also Doug Kendall & Glenn Sugameli, Cmty. Rights Counsel & Earth Justice, *Janice Rogers Brown and the Environment: A Dangerous Choice for a Critical Court*, COMMUNITY RTS. COUNS., 2, 8 (Oct. 21, 2003), <http://www.communityrights.org/PDFs/BrownReport.pdf>.

⁷James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

of constitutional provisions are important, though not exclusive, components of constitutional interpretation; and (3) that, whatever “original meaning” means, other factors, including precedent and evolving circumstances, are appropriate considerations for judges to factor into decisions.⁸ Differences over such methodological issues have narrowed and no longer necessarily correspond to left–right political or ideological divisions among progressives or even between progressives and conservatives.

To meet the new challenges of political debate over the Constitution, progressive politicians, justices, and, increasingly, court-focused progressive advocates are turning to three approaches: first, emphasizing the threat posed by conservative pro-corporate judicial “activism” to basic, mainly “pocketbook” needs of “ordinary people”; second, stressing fidelity to the Constitution and democratically enacted laws, and grounding arguments in the content and original meaning of constitutional and statutory provisions (an approach also consistent with branding conservatives as “activist” for their selective infidelity to these basics of the civics class canon); and, third, detailing the drastic real-world consequences of conservative and libertarian constitutional (or statutory) interpretations. For example, President Obama’s rhetoric has significantly embraced these approaches. He has noted that “we are all constitutionalists.”⁹ He has stressed that appreciation of the impact of the courts on everyday concerns is a prime criterion for picking judicial nominees and prominently attacked the Roberts Court’s *Lilly Ledbetter*¹⁰ and *Citizens United*¹¹ decisions.¹² The White House’s approach was partly inspired by Senate Judiciary Committee Democrats. Beginning in 2008, Chair Patrick Leahy and his colleagues have, in oversight and legislative hearings, floor statements, and during judicial confirmation proceedings, repeatedly attacked the Rehnquist and Roberts Supreme Courts for systematically gutting laws enacted to remedy abuses related to consumer credit, retirement security, employment discrimination, health care, and similar needs, “sometimes turning these laws on their heads and making them protections for big business rather than for ordinary citizens.”¹³ Similarly, the Administration and other advocates defending the constitutionality of the 2010 Affordable Care Act have emphasized that prescribing broad and effective authority to regulate the national economy was a priority objective of the Framers, as confirmed by the

⁸ *Id.* at 1525–26.

⁹ BARACK OBAMA, THE AUDACITY OF HOPE 88 (2006).

¹⁰ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

¹¹ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

¹² See *infra* Parts II.A.2–4.

¹³ *Short-Change for Consumers and Short-Shrift for Congress? The Supreme Court’s Treatment of Laws that Protect Americans’ Health, Safety, Jobs and Retirement: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) [hereinafter *Short-Change*] (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:44331.pdf.

foundational interpretations of their contemporary, Chief Justice John Marshall.¹⁴

This Article will outline, from an advocate's perspective, the recent evolution of progressives' approaches to promoting their vision of the Constitution and the role of the courts, in academic circles and in real-world litigation, governmental, and media arenas. It will identify what I see as the principal new strategies that progressive advocates have rolled out to counter the apparently comparative effectiveness, and increasingly reactionary and radical agenda, of conservatives. Finally, the Article will offer suggestions as to how progressives should refine and deploy these new strategies to maximize their impact.

II. PROGRESSIVE CONSTITUTIONALISM IN THE ACADEMY: AN ADVOCATE'S TAKE ON WHERE WE ARE AND HOW WE GOT HERE

Among progressive academics, a principal focus of efforts to respond to conservatives' drive to capture control of the courts and the constitutional agenda has been to develop a distinctive "progressive constitutionalism," sometimes called a progressive "vision" of the Constitution, "constitutional fidelity," "democratic constitutionalism," or other similar labels.¹⁵ This quest was conceived as a reaction to "originalism," the principal theoretical component of conservatives' constitutional credo.¹⁶ At its inception, originalism was cast by its architects, Robert Bork, Antonin Scalia, Edwin Meese, and their lieutenants, as itself a reaction to progressives' concept of a "living Constitution."¹⁷ Both sides saw originalism as a philosophical basis for

¹⁴ See Brief for Appellant, Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), 2011 WL 686279, at *19; Brief of Senate Majority Leader Harry Reid et al. as Amici Curiae in Support of Appellees, Urging Affirmance at 8–9, Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388), 2011 WL 1653749, at *8–9 (citing *Gonzales v. Raich*, 545 U.S. 1, 16 (2005)). I elaborated this point in an issue brief for the American Constitution Society. See Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, AM. CONST. SOC'Y, 2, 4–7 (Feb. 2011), http://www.acslaw.org/sites/default/files/lazarus_-_health_reform_lawsuits_0.pdf; see also Brief of Amici Curiae State Legislators in Support of Defendants-Appellants, U.S. Dep't of Health & Human Servs. v. Florida *ex rel.* Att'y Gen., 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067), 2011 WL 1461595.

¹⁵ See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

¹⁶ See generally Ryan, *supra* note 7, at 1529.

¹⁷ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971); Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 5–6 (1988); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 41–47 (Amy Gutmann ed., 1997).

opposing the Warren Court's expansion of individual constitutional rights via the argument that the "original" Constitution provided no sanction for the Court's aggressively crafted safeguards for criminal procedure, gender discrimination, privacy, religious autonomy, racial balance, and other areas of controversy. Likewise, both sides saw the living Constitution—the idea that the meaning of the Constitution could change in response to changing circumstances—as a formula for defending, and, indeed, extending the Warren Court's jurisprudence.¹⁸ For conservatives, originalism was consistent with and complementary to themes they repeatedly struck in their political advocacy about the courts and the Constitution—support for "strict construction" and aversion to "activist" judges who "legislate from the bench." Progressives tended not so much to deny all these critiques as to ignore them, or dismiss them as subterfuges—"just a form of name-calling, a dirty word for judges who issue decisions that the speaker does not like."¹⁹

*A. Progressive Critics Score; Academic Originalists Retreat;
Conservative Advocates Advance*

No doubt, progressives' disdain for their upstart challengers was reinforced by devastating criticisms made early-on by academic critics of originalism—most but not all of them progressives. These critics scored three related, and significant, points. First, they demonstrated that the interpretations that the Framers "intended" to attach to disputed constitutional provisions, despite the abundance of evidence from the records of the Constitutional Convention and otherwise, were often for all intents and purposes unknowable and at best a weak reed for applying the Constitution to specific cases involving modern conditions.²⁰ Second, scholars showed, on the basis of both the broad and malleable terms written into the Constitution and its drafting and ratification history, that the Framers themselves did not intend the meaning of the document to be limited by contemporaneous late eighteenth-century societal practices. Hence, to respect the intent of the Framers meant to allow interpretations of their work to evolve as historical circumstances changed.²¹ Hence, these scholars noted, it is appropriate and consistent with honoring the constitutional

¹⁸Ryan notes that by "suggesting that landmark decisions [like *Brown v. Board of Education* and *Roe v. Wade*] . . . could not be squared with the original meaning of the Constitution, these [progressive] critics essentially conceded that conservatives were correct in charging that the Warren Court had gone beyond the Constitution." Ryan, *supra* note 7, at 1536.

¹⁹HERMAN SCHWARTZ, *RIGHT-WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* 148 (2004).

²⁰A leading exponent of this widespread criticism was Paul Brest. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 234–37 (Jack N. Rakove ed., 1990).

²¹The principal exponent of this point was H. Jefferson Powell. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

text and the original understanding for judges to give weight to the practical consequences of differing potential interpretations of its provisions.²² Third, for those reasons and because neither drafters' (nor ratifiers') subjective intentions nor external circumstances could legitimately trump the constitutional text itself, originalism—defined as original “intent” or original “expected application originalism”—appeared insupportable as a legitimate interpretive methodology, whatever one's political leanings.²³

Among academic proponents of originalism—in particular, their most noted public champion, Justice Antonin Scalia—these criticisms struck home. They modified the “original intent” formulation initially put forward by Robert Bork, Reagan Attorney General Edwin Meese, and Scalia himself. They replaced this with a revision—“original meaning” originalism. The precise meaning of this new mantra was, and remains, something of a moving target, and different adherents endorse differing versions, or emphases. But in general, originalism 2.0 connoted the original text of whatever constitutional provision is at issue, “objectively” understood as contemporaneous society—drafters, ratifiers, observers—would have understood it, not as drafters subjectively “intended”—nor, to be sure, as later generations might understand its meaning however many decades or centuries later.²⁴ As the debate continued, academic conservative originalists fashioned versions 2.1, 2.2, etcetera. These further revisions acknowledge that major constitutional provisions are very broad and abstract, susceptible of differing interpretations and, specifically, susceptible to evolving interpretations as time progresses and circumstances change.²⁵

This shift toward moderation by academic originalists did not dampen the militancy of conservative political constituencies and advocates, which steadily increased during the last decades of the twentieth century, nor did it soften their rhetoric.²⁶ Nor did these concessions diffuse the passionate anti-originalist

²² Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1373 (1990).

²³ See, e.g., Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 17, at 5–27.

²⁴ The process by which proponents of the “Doctrine of Original Intent” acknowledged the force of progressive criticisms and substituted a new “Doctrine of Original Meaning” is described in, among other sources, Ryan, *supra* note 7, and an entry on University of Illinois Law and Philosophy Professor Lawrence B. Solum's blog. See *Legal Theory Lexicon 019: Originalism*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html (last updated Nov. 4, 2010).

²⁵ Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 665 (2009).

²⁶ The steady rightward shift and increasing militancy of Senate Republicans on matters relating to the courts, beginning in the early 1990s and continuing through President George W. Bush's first term, is detailed in SCHWARTZ, *supra* note 19, at 131–272. The history is updated through the Sotomayor nomination and further analyzed in Simon Lazarus, *Don't Blame Democrats for Republican Obstruction of Obama's Judicial Nominees*, ROLL CALL (June 25, 2009, 6:24 PM), <http://www.rollcall.com/news/-36303-1.html>, and Kendall & Lazarus, *supra* note 2.

intensity of many progressive academics.²⁷ What ardent anti-originalists did notice was that, outside the academy, their logically compelling criticisms seemed to fall flat. By the turn of the twenty-first century, Republican politicians grew increasingly aggressive, and successful, at mobilizing support for highly ideological federal judicial nominees and stonewalling Democratic nominees.²⁸ Increasingly, progressives recognized that the living Constitution had failed as a useable banner in this escalating war over the courts. On the political and public opinion side, conservatives had ruined the living Constitution brand by successfully equating it with a penchant for “making it up as we go along,” i.e., an excuse for unprincipled judicial activism driven by judges’ (liberal) political and policy preferences.²⁹ Sounding a lament common among progressives in and out of the academy, Yale’s Robert Post and Reva Siegel wrote in 2006, “Originalism remains even now a powerful vehicle for conservative mobilization.”³⁰ Explaining progressives’ predicament, William Forbath observed in 2010 that, whereas conservatives invoke the Framers’ “original understanding” when they strike down a law, “[w]hen liberal judges strike down a law, they are ‘making up’ new law . . . [and] [b]etraying the Founding Fathers.”³¹

B. Progressive Responses: Living Constitution Lite and Progressive Originalism

To respond to this discouraging situation, some progressive thinkers and advocates set to work developing new approaches designed to satisfy dual prerequisites: avoid conservatives’ line of attack on “activist” liberal jurisprudence, but at the same time avoid any appearance of embracing their adversaries’ “originalism” credo. These approaches tended to emphasize that the major provisions of the Constitution established enduring *principles*; but, applying these constant principles to changing historical circumstances does not necessarily require inquiry into or deference to the “original meaning” of the constitutional text—the principles that the Framers or ratifiers would have

²⁷ See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

²⁸ See *supra* note 26 and accompanying text.

²⁹ Edward Whelan, Op-Ed., *Judicial Activism Awards Fixed!*, *L.A. TIMES* (Oct. 24, 2007), <http://www.latimes.com/news/opinion/la-oe-whelan24oct24,0,3706916.story?coll=la-opinion-center>; Press Release, Senator Orrin Hatch, Hatch Strongly Opposes Nomination of Goodwin Liu to Ninth Circuit (May 19, 2011), *available at* <http://hatch.senate.gov/public/index.cfm/releases?ID=2635d4dd-104c-4061-bd9b-3073896f5d43>.

³⁰ Post & Siegel, *supra* note 27, at 546.

³¹ William Forbath, Op-Ed., *The Framers and Us: How Not to Use History to Argue About the Constitution and the Supreme Court*, *POLITICO* (Apr. 17, 2010), http://www.politico.com/arena/perm/William_Forbath_4987AC64-32A8-47E9-BF15-E469DB520F5D.html.

perceived in the text. Hence, approaches plying this vein of progressive constitutionalism drop the discredited label, "living Constitution," and acknowledge that there is something significant—"principles" or "values"—underlying the text to which judges must refer for guidance. But they retain, if in more qualified terms, the spin of vintage living constitutionalists, that the heavy lifting in constitutional interpretation falls to interpretation itself, and that its interpreters, i.e., judges, are appropriately driven by considerations independent of the text and the original understanding.³²

Other progressive academics, however, disclaimed interest in fashioning new "living Constitution lite" approaches. In the 2000 edition of his treatise, *American Constitutional Law*, Laurence Tribe noted that several identifiable modes of interpretation recur in constitutional adjudication, and that "[n]o one mode . . . can claim always to take priority or to be necessarily decisive."³³ But, Tribe wrote, among these approaches, "text is paramount," is a circumstance that is "inevitable if the Constitution is to be seriously regarded as law—and seems invulnerable to major objection provided one does not pretend that the text answers all questions of meaning."³⁴ Further, Tribe stressed that, while the original interpretation (i.e., meaning) of the text is not necessarily controlling, the "burden of justification" must rest on those who contend that a "changed meaning" is warranted by intervening developments.³⁵ Tribe concludes that "[t]o the degree that original meaning would at least establish a baseline and create a presumption to be overcome, its gravitational pull remains undeniable."³⁶

Other progressive scholars took Tribe's acknowledgement of the "inescapability of a moderate originalism" a step further. They operationalized it. In several articles and in particular a 2005 book, *America's Constitution: A Biography*, Akhil Amar demonstrated that the constitutional text, and the original meaning of the text, in fact provide compelling support for progressive positions. Amar challenged the largely unquestioned libertarian originalist precept that the 1789 Constitution was incompatible with modern activist federal domestic government and international leadership. He also stressed the

³² See, e.g., Robert Post & Reva Siegel, *The Only Way Liberals Can Compete in Constitutional Interpretation*, NEW REPUBLIC (Sept. 18, 2007), <http://www.tnr.com/article/liberal-originalism>. In a recent debate with progressive originalists (or in their own terminology, "new textualists"), Doug Kendall, Jim Ryan, Geoffrey Stone, and William Marshall acknowledged that the Framers' "values, concerns, and purposes, as reflected in the text of the Constitution, must inform and guide the process of constitutional interpretation, but . . . as a set of general principles and aspirations." See Geoffrey R. Stone & William P. Marshall, *The Framers' Constitution*, DEMOCRACY: J. IDEAS, Summer 2011, at 59, 61, 65 (emphasis added), available at http://www.democracyjournal.org/pdf/21/the_framers_constitution.pdf.

³³ 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 32 (3d ed. 2000).

³⁴ *Id.*

³⁵ *Id.* at 49.

³⁶ *Id.* at 52.

obvious point, which conservative originalists had often been wont to overlook, that the Constitution includes the Bill of Rights, Reconstruction, and Progressive Era Amendments; especially when original meaning is emphasized, all of these shift the thrust of the overall document leftwards in major respects.³⁷

Amar's pioneering work was further developed by his Yale colleague Jack Balkin. Drilling deeply into the historical record, Jack Balkin refuted the line repeated incessantly by Justice Clarence Thomas and fellow libertarians that the Framers and their contemporaries understood "interstate commerce" as nothing broader than "trade," hence at odds with the post-New Deal empowerment of Congress to reach all matters necessary to regulate the national economy.³⁸ Balkin has also offered an ingenious and extensively researched originalist argument for retaining Fourteenth Amendment protection for abortion,³⁹ an originalist analysis integrating the three Reconstruction Amendments that yields a far more extensive scope to their substantive and enforcement reach than prescribed by Supreme Court precedents,⁴⁰ and a theoretical framework for melding originalism and living constitutionalism that emphasizes evolutionary realization of ideals embedded in the constitutional text and original meaning.⁴¹

Complementing and reinforcing the work of Amar and Balkin is a 2003 book, relatively unnoticed as yet in American legal circles, by Swedish historian Max Edling, *A Revolution in Favor of Government*. Edling elaborately documents his thesis—reinforcing Amar's similar conclusion—that the Federalists' priority, well understood and articulated by both sides in the ratification debate, was "to create a strong national state in America, a state possessing all the significant powers held by contemporary European states" (i.e., plenary power to tax, spend, conduct foreign affairs, raise armies, declare war, and regulate national and international economic affairs).⁴²

³⁷ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 474–76 (2005).

³⁸ Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010).

³⁹ Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–95 (2007).

⁴⁰ Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1801–02 (2010).

⁴¹ Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007). Balkin's redemption concept closely resembles the transcendentalist notion, characterized by Garry Wills as the driving force behind Lincoln's Gettysburg Address that the United States could evolve to realize in practice the core values reflected in its founding documents, effectively, in the Address, reading the Declaration of Independence into the Constitution. GARRY T. WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 104–47 (1993).

⁴² MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* 4 (2003). Although, to my knowledge, Edling's work has not been incorporated in the work of American constitutional scholars or advocates, eminent American historians have recognized it as, in the words of Gordon Wood on the Edling volume's back cover, "a powerfully argued revisionist interpretation of the origins of the Constitution," and by Jack Rakove as one of six noteworthy books on the framing of the Constitution (along with Wood's *Creation of the*

Other scholars have exhaustively researched the original meaning of constitutional provisions at issue in major contemporary controversies, including congressional authority to enforce the Reconstruction Amendments, affirmative action, substantive application of the due process clauses of the Fourteenth and Fifth Amendments, and the Second Amendment. Their work shows that contemporary conservative positions on these issues have highly controvertible, or, more often, transparently flimsy connections to the actual text of the Constitution, as well as to the understandings and purposes that drove those who drafted and ratified them.⁴³

Debate over these issues generated a truly vast literature in the past decade. In some quarters, passions invested in particular positions or by particular scholars continued to run high.⁴⁴ But it would seem long past time for this ardor to cool, and, indeed, for the debate itself to close. From the standpoint of an outside observer, there is nothing there. Substantially all progressive academics and, indeed, substantially all conservative academics now commonly acknowledge (1) that the initial, "original intent" version of originalism is untenable; (2) that, on the other hand, text and "original meaning" of constitutional provisions are important, though not exclusive, components of constitutional interpretation; and (3) that, whatever "original meaning" means, other factors, including precedent and evolving circumstances, mores, and the consequences of alternative interpretations are often relevant to applying specific provisions to contemporary issues.⁴⁵ Differences over such methodological issues have narrowed and no longer necessarily correspond to left-right political or ideological divisions among progressives or even between progressives and conservatives.⁴⁶

American Republic and Rakove's own *Original Meanings*). Interview by Eve Gerber with Jack Rakove (July 4, 2011), available at <http://thebrowser.com/interviews/jack-rakove-on-us-constitution>.

⁴³ Applications of originalist types of arguments to support progressive results in specific subject-matter areas are collected and reviewed by Ryan, *supra* note 7, at 1527–28, 1545–46.

⁴⁴ In 2007, Yale professors Reva Siegel and Robert Post (now Dean of Yale Law School), while recognizing that "Liberals *do* need to re-learn how to make claims directly on the Constitution," nevertheless equated progressive efforts to "reclaim the Constitution and profess fidelity to its text and original meaning" with "the right seem[ing] to have won the battle of constitutional theory." Post & Siegel, *supra* note 32. In the same vein, they counsel rejection of "a method of interpretation that strongly privileges the history of constitutional lawmaking over the experience of living under the Constitution," and "shackle[s] [progressives] to the constitutional understandings of the nineteenth century." *Id.*

⁴⁵ An especially lucid and comprehensive canvass of the academic originalism—"living Constitution" debate has recently been published in the form of a debate between originalist Illinois University Law Professor Lawrence B. Solum and living constitutionalist Northwestern University Professor (and former Dean) Robert W. Bennett. See ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011).

⁴⁶ For example, in an American Constitution Society-sponsored 2009 volume designed to outline a consensus progressive approach to constitutional interpretation characterized as

III. PROGRESSIVE ADVOCACY ABOUT THE CONSTITUTION AND THE COURTS

During the last three decades, while the academic wars over originalism raged, and while real-world conservative advocates, politicians, and judges never missed an opportunity to trumpet their fealty to the “original” Constitution, the Framers’ intent, “strict construction,” and “judges who do not legislate from the bench,” their real-world progressive adversaries were all but mute on these issues. Progressive advocates (including politicians and judges) steered clear of discussing, let alone embracing, any overarching constitutional vision or philosophy. Their affirmative advocacy about the courts focused principally on specific results they wished to secure, usually framed as “rights,” targeted at particular constituencies, e.g., women, people with disabilities, or racial or ethnic minorities. Their response to the incessant din of conservative complaints about “liberal activist judges” was either to dismiss the charge as irrelevant, politically motivated, simply a convenient epithet for attacking persons or decisions with which conservatives disagree, or, more often, to remain silent. In significant part, progressives’ skittishness stemmed from politicians’ perceptions, reinforced by poll results, that conservatives’ messages about the Constitution and the courts were popular. In a January 2009 Rasmussen poll, 64% of independents and 52% of Democrats agreed that Supreme Court decisions should be “guided by what’s written in the Constitution,” as opposed to “fairness and justice” (as, predictably, did 79% of Republicans).⁴⁷ Unsurprisingly, progressives’ diffidence left the public with no counter to conservative charges that progressives’ infatuation with a “living Constitution” meant that Democratic appointees to the federal bench would be prone to ignore the law and “make it up as they go along”; the same poll showed that only 35% of the electorate expected then-candidate Obama to nominate judges who would follow the written Constitution.⁴⁸

To fill this void, in the past few years, progressive advocates, politicians, and judges have identified and begun to deploy three strategies for strengthening the progressive voice in the wars over the courts and the Constitution.

“constitutional fidelity,” co-authors Goodwin Liu, Pamela Karlan, and Christopher Schroeder state that:

[O]ur view of constitutional fidelity is not at odds with originalism if originalism is understood to mean a commitment to the underlying principles that the Framers’ words were publicly understood to convey, as opposed to the Framers’ expectations of how those principles would have applied at the time they were adopted.

GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 35 (2009).

⁴⁷ Kendall & Lazarus, *supra* note 2, at 35.

⁴⁸ *Id.*

A. *Don't-Twist-the-Law-to-Favor-the-Big-Guy*

1. *Senate Judiciary Democrats Develop the Message*

In June 2008, Senate Judiciary Committee Chair Patrick Leahy launched a series of oversight hearings stretching over three years, designed, as he stated in his opening statement, “to shine a light on how the Supreme Court’s decisions affect Americans’ everyday lives.”⁴⁹ Noting that, especially in today’s distressed economy, citizens are preoccupied with health care coverage, retirement uncertainty, and credit card, home mortgage, and other monthly payments, Leahy observed, “Congress has passed laws to protect Americans in . . . these areas, but in many cases, the Supreme Court . . . has ignored the intent of Congress.”⁵⁰ Indeed, for the previous three decades, the Court’s hostility to consumer, employee, retiree, and other statutory protections, particularly to individual suits to enforce them, had been a secret hiding in plain sight. During that period, in which Republican presidents selected twelve Supreme Court justices and Democrats managed only two, business community advocates had repeatedly asked the Court to narrow or neutralize laws enacted by progressive Congressional majorities. “Oftentimes,” as Leahy said, the conservative majorities on the Court had “turn[ed] these laws on their heads and ma[de] them protections for big business rather than for ordinary citizens.”⁵¹

Leahy’s hearings hosted numerous “ordinary citizens” and experts who bore compelling witness to the validity of his opening critique. Some examples:

- A 44-year-old Pennsylvania lupus patient testified on June 11, 2008, that the insurer to which her husband’s employer had transferred his family coverage interrupted her treatment and for months stonewalled her requests to resume it, causing septic shock that resulted in amputation of her right foot and five fingers; reluctantly, the Third Circuit Court of Appeals had ruled that the Supreme Court’s “unjust and increasingly tangled” interpretation of the 1974 federal Employee Retirement Income Security Act (ERISA) barred any monetary compensatory relief, and, further, that ERISA preempted claims for compensation under state negligence and trust law.⁵²

⁴⁹ *Short-Change*, *supra* note 13, at 1 (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 8–10. Yale Professor John Langbein dissects the Supreme Court majority’s ERISA jurisprudence in John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003). Numerous justices and judges have condemned what Justice Ginsburg decried as the “regulatory vacuum” resulting from the Court’s one-two punch of “an encompassing interpretation of ERISA’s preemptive force [and] a cramped construction of the ‘equitable

- On July 23, 2008, representatives of the 32,000 fishermen whose livelihoods were destroyed by the 1989 Exxon-Valdez oil spill off the Alaskan coast testified on the impact of the Court's end-of-term decision in *Exxon Shipping Co. v. Baker*, in which a 5–3 majority slashed damages from \$2.5 billion to \$500 million overall, i.e., from \$75,000 to \$15,000 apiece—far less than needed to cover the actual economic devastation wrought by the spill.⁵³ Four of the justices would have barred *any* punitive damages at all against Exxon. As Justice Stephen Breyer noted in his dissent, “[T]his was no mine-run case of reckless behavior,” but a matter in which “Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case.”⁵⁴
- On several occasions, the Judiciary Committee and the Senate Committee on Health, Education, Labor, and Pensions targeted the June 18, 2009, 5–4 decision, *Gross v. FBL Financial Services, Inc.*, which radically weakened long-standing standards for protecting employees against discrimination under the Age Discrimination in Employment Act (ADEA) and numerous other antidiscrimination laws.⁵⁵ The decision held that a victim of age discrimination, in order to prevail in court, must prove that unlawful bias was the “but-for” cause of adverse treatment—often tantamount to having to show that it was the *exclusive* factor in the adverse decision.⁵⁶ As a practical matter, especially since employers create paper trails purporting to justify adverse actions on legitimate business-related grounds, this is a standard that is in most cases literally impossible to meet. In effect, the 5–4 *Gross* majority relieved employers of virtually all legal risk for discriminating against older workers, so long as they do not actually state that they are singling out employees for adverse treatment solely because of age.
- The Judiciary Committee has repeatedly spotlighted the conservative majority's broadening conversion of the 1925 Federal Arbitration Act from a limited endorsement of business-to-business consensual commercial arbitration agreements into a tool empowering businesses to shield themselves from liability for violating virtually all federal and

relief’ allowable under [the federal statute].” See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring).

⁵³ *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 4–6 (2008) [hereinafter *Courting Big Business*] (statement of Osa M. Schultz), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:48144.pdf.

⁵⁴ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 525 (2008) (Breyer, J., dissenting).

⁵⁵ *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009).

⁵⁶ *Id.* at 2351.

state laws protecting consumers, employees, retirees, depositors, beneficiaries, and other dependent individuals. At a July 23, 2008, hearing, Harvard law professor Elizabeth Bartholet testified that, of all the legislative fixes that Congress might consider to correct Supreme Court decisions that weakened workplace antidiscrimination protections, none would have more impact than to reverse the Court's expansion of the FAA to preempt state laws protecting individual employees from binding mandatory agreements waiving their right to seek court redress for violations of federal or state statutory rights.⁵⁷ In April 2011, Judiciary Committee members Al Franken of Minnesota and Richard Blumenthal of Connecticut attacked the most recent extension of the Court's forced arbitration jurisprudence, the *AT&T Mobility LLC v. Concepcion* decision that preempted a California statute barring consumer sales agreements with fine print provisos requiring all consumer legal claims to be handled through arbitration mechanisms on a one-by-one basis with no collective or class challenges.⁵⁸

- On June 29, 2011, Senator Leahy chaired a hearing to "highlight" Supreme Court decisions at the end of the 2010–2011 term that gave "corporations additional power to act in their own self-interest."⁵⁹ In addition to *AT&T Mobility LLC v. Concepcion*, the hearing targeted *Janus Capital Grp., Inc. v. First Derivative Traders*, in which "the same five justices gave corporations another victory by shielding them from accountability even when they knowingly lied to their investors"—a "license to lie" and a "roadmap for fraud," as Leahy said.⁶⁰ The hearing also examined *Wal-Mart Stores, Inc. v. Dukes*, in which the conservative bloc held that a large corporation could not be subjected to an employment discrimination class action by employees from different units or branches, as long as the company maintained a written nondiscrimination policy and delegated payment decisions to

⁵⁷ *Courting Big Business*, *supra* note 53, at 9 (statement of Elizabeth Bartholet, Professor, Harvard Law School).

⁵⁸ Press Release, Senator Al Franken, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts Against Corporations (Apr. 27, 2011), available at http://franken.senate.gov/?p=press_release&id=1466.

⁵⁹ *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=3d9031b47812de2592c3baeba607fb62&wit_id=3d9031b47812de2592c3baeba607fb62-0-1.

⁶⁰ *Id.*

the units or branches—making it “harder to hold corporations accountable under our historic civil rights laws.”⁶¹

2. *Progressives Overturn the Court’s Evisceration of Equal Pay Opportunity Guarantees in Ledbetter v. Goodyear*

Several of the Senate Judiciary Committee’s oversight hearings on judicial favoritism for corporate interests over consumers featured the *Ledbetter v. Goodyear Tire & Rubber Co.* decision, which achieved widespread notoriety as soon as it was handed down on May 29, 2007.⁶² The case was brought by Lilly Ledbetter, a supervisor at a Goodyear Tire & Rubber Co. plant in Gadsden, Alabama, from 1979 to 1998. When she retired, Ledbetter was tipped off by a co-worker that, throughout her career, she had received lower pay than her male counterparts performing identical work. The Supreme Court reversed a jury verdict in favor of Ledbetter. The familiar 5–4 majority held that her suit was barred by the Title VII statute of limitations provision, which requires workers to file suit within 180 days after the last act they allege to be discriminatory. Ledbetter had contended that her most recent paychecks were part of a chain of acts which flowed from and were infected by the original company decisions to give her second-class status. The Court’s decision to the contrary—that the initial discriminatory decision was also the last discriminatory act within the meaning of the statute—as Justice Ginsburg noted in the dissent she read from the bench, “grandfathered” the sexist practices that side-tracked Ledbetter’s career, and made the seminal injustice “*a fait accompli* beyond the province of Title VII ever to repair.”⁶³ Like Ledbetter, employees typically learn of pay discrimination only by happenstance and long after the decisions that triggered their persistent mistreatment. In effect, the majority’s reading rendered the substantive equal pay opportunity guarantee of Title VII unenforceable by, and useless to, the discrimination victims the law was enacted to protect.⁶⁴

Spurred by progressive advocates, the House of Representatives passed a legislative “fix” bill barely two months after the *Ledbetter* decision came down. In April 2008, an attempt to break a Senate filibuster against the bill produced fifty-seven affirmative votes—three short of the sixty needed to prevail but, significantly, including six Republicans, who evidently were more concerned about retribution from women constituents than from their party leadership.⁶⁵

⁶¹ *Id.*; see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁶² *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

⁶³ *Id.* at 644 (Ginsburg, J., dissenting).

⁶⁴ *Id.* at 643–60.

⁶⁵ Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22, available at <http://www.nytimes.com/2008/04/24/washington/24congress.html>. Before the final tally, Majority Leader Harry Reid switched his vote to

Democratic presidential front-runner Barack Obama took note of the surprisingly broad appeal of this case about an obscure female factory worker over an impenetrable question of legal procedure. He arranged for her to speak to the Democratic National Convention at which he received the party's nomination for the presidency, declared that enacting the legislation to overturn the case would be an early priority for an Obama Administration, conspicuously placed her with him on the train on which he traveled from Philadelphia to Washington, D.C. for his inauguration, and seated her among his cadre of special guests for his first address to a joint session of Congress.⁶⁶ One week after the inauguration, Obama made the Lilly Ledbetter Fair Pay Restoration Act the first bill he signed into law as President in a triumphal East Room signing ceremony, the bill having passed the Senate 61–36 with five Republican votes.⁶⁷

Initially, Obama narrowly cast the *Ledbetter* case as a gender issue, targeted at women voters.⁶⁸ But over the course of the ensuing year, he and his strategists broadened the message. In a May 2009 C-SPAN interview, weeks before announcing his nomination of Second Circuit Judge Sonia Sotomayor to replace retiring Justice David Souter, Obama said he was looking for a judge who had “not only the intellect to . . . apply the law to cases,” but “a sense of how American society works and how the American people live,” the ability “to stand in somebody else’s shoes and see through their eyes and get a sense of how the law might work or not work in practical day-to-day living.”⁶⁹ Obama cited the *Ledbetter* case as an example, because he thought that “anybody who has ever worked in a job like [Lilly Ledbetter’s] understands that they might not know that they were being discriminated against It doesn’t make sense for their rights to be foreclosed.”⁷⁰

negative to enable him to move to reconsider the motion at a later date consistent with applicable parliamentary rules; hence, the official final tally was 56–44 in favor of cloture. *Senate Republicans Block Unequal Pay Bill*, CNN (Apr. 23, 2008), http://articles.cnn.com/2008-04-23/politics/senate.discrimination_1_lilly-ledbetter-majority-leader-harry-reid-senate-republicans?_s=PM:POLITICS.

⁶⁶ Michael Falcone, *Guests of the First Lady, Reflecting Main Themes of the Speech*, N.Y. TIMES, Feb. 25, 2009, at A16, available at <http://www.nytimes.com/2009/02/25/us/politics/25guests.html>; *Obama Touts Equal-Pay Bill at Signing Ceremony*, MSNBC (Jan. 29, 2009, 8:08 PM), http://www.msnbc.msn.com/id/28910789/ns/politics-white_house/t/obama-touts-equal-pay-bill-signing-ceremony/.

⁶⁷ Richard Leiby, *A Signature with the First Lady’s Hand in It*, WASH. POST, Jan. 30, 2009, at C1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/29/AR2009012901887.html?hpid=topnews>.

⁶⁸ Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 30, 2009), <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

⁶⁹ Interview by Steve Scully, C-SPAN, with Barack H. Obama, President (May 22, 2009), available at <http://www.cspan.org/pdf/obamainterview.pdf>.

⁷⁰ *Id.*

3. *Citizens United Ratchets Up the Stakes*

In January 2010, the conservative justices gave the Obama White House team, which in their first months in office declared themselves “eager” to defuse the political war over the courts and the Constitution, a brusque push toward ratcheting up their critique of the Roberts Court. On January 10, the familiar 5–4 split yielded the *Citizens United* decision, holding that corporations were entitled to First Amendment protection against governmental limitations on political activity, on an equal basis with actual human persons, thereby invalidating over a century of federal and state laws.⁷¹ Obama, stunned, immediately attacked the decision: “With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics.”⁷² He then followed up with an unprecedented face-to-face condemnation in his January 27, 2010, State of the Union address with three signatories of the decision in the audience.⁷³ Three months later, when the White House received Justice John Paul Stevens’s notice that he would resign at the end of the 2009–2010 Supreme Court Term on April 9, Obama was ready with a pointedly worded recipe for plugging this gap. Obama would look for a justice, he said, who combines “a fierce dedication to the rule of law” with “a keen understanding of how the law affects the daily lives of the American people.”⁷⁴ He added, “It will also be someone who, like Justice Stevens, knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens.”⁷⁵ Robert Barnes, the *Washington Post*’s Supreme Court correspondent, and Anne Kornblut translated this as reflecting a switch on the part of progressives in and out of government, away from a focus on “divisive social interests,” to a new “major theme . . . what Obama and Democrats refer to as the pro-corporation leanings of the conservative members

⁷¹ *Citizens United v. FEC*, 130 S. Ct. 876, 949–54 (2010) (Stevens, J., dissenting).

⁷² Press Release, Statement from the President on Today’s Supreme Court Decision (Jan. 21, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0>.

⁷³ President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H418 (daily ed. Jan. 27, 2010) (“[T]he Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.”); Adam Liptak, *Six Justices to Attend State of the Union*, N.Y. TIMES (Jan. 25, 2011), <http://www.nytimes.com/2011/01/26/us/politics/26justices.html>.

⁷⁴ President Barack Obama, Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy (Apr. 9, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>.

⁷⁵ *Id.*

of the Court.”⁷⁶ Barnes and Kornblut noted that court-focused progressive advocacy groups, such as People for the American Way, Alliance for Justice, Constitutional Accountability Center, and National Senior Citizens Law Center, were stressing the same message, along with the Senate Judiciary Committee members, who would examine Obama’s selection to replace Stevens and make a recommendation to the full Senate.⁷⁷

4. Democrats Stay on Message for Justice Kagan’s Confirmation

Obama’s May 2010 message tracked the mantra developed in the Judiciary Committee’s oversight hearings. Specifically, the White House followed Senator Leahy’s lead in stressing fidelity to the “rule of law” as well as concern for its impact on “ordinary citizens.” During the 2008 campaign, Obama had drawn Republican fire by stating that he was looking to name to the courts judges who possessed “the empathy to understand what it’s like” to be vulnerable and disadvantaged.⁷⁸ Conservatives seized on Obama’s “empathy” formulation as evidence that he wanted the courts to implement a “redistributionist” agenda via “the appointment of judges committed in advance to violating [their] oath,” to “administer [equal] justice to the poor and to the rich,” and Republican senators presaged a similar line of attack as the struggle over Stevens’ replacement loomed.⁷⁹ The Democrats countered aggressively, by pointing to the Court’s conservatives as the activists culpable for ignoring the law to favor the powerful. On *Meet the Press*, Senator Leahy charged that the Roberts Court is “the most activist court in my lifetime.”⁸⁰ Specifically, he went on, “They rewrote the law . . . [so] that women could be paid less than men,”⁸¹ referring to the 2007 decision in *Ledbetter*,⁸² crippling workplace discrimination guarantees (overturned with a February 2009 bill that was the first that incoming President Obama signed into law⁸³). “They rewrote the law,” Leahy added, “to say that age discrimination laws won’t apply if corporate

⁷⁶ Robert Barnes & Anne E. Kornblut, *Wanted on the Court: Sensitivity to Ordinary Americans*, WASH. POST, Apr. 26, 2010, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/25/AR2010042502918.html?sid=ST2010042502974>.

⁷⁷ *Id.*

⁷⁸ Adam Liptak et al., *On the Issues: Supreme Court*, N.Y. TIMES (Apr. 22, 2011), <http://elections.nytimes.com/2008/president/issues/judges.html>.

⁷⁹ 156 CONG. REC. S2219–20 (daily ed. Apr. 13, 2010) (statement of Sen. Jon Kyl); Steven Calabresi, Op-Ed., *Obama’s ‘Redistribution’ Constitution*, WALL ST. J., Oct. 28, 2008, at A17, available at <http://online.wsj.com/article/SB122515067227674187.html>.

⁸⁰ ‘*Meet the Press*’ Transcript for April 11, 2011, MEET THE PRESS (Apr. 11, 2010), http://www.msnbc.msn.com/id/36362669/ns/meet_the_press/t/meet-press-transcript-april/.

⁸¹ *Id.*

⁸² 550 U.S. 618 (2007).

⁸³ *Obama Touts Equal-Pay Bill at Signing Ceremony*, *supra* note 66; see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

interests don't want them to,"⁸⁴ referring to a 2009 5–4 decision that Justice Stevens in dissent called "unabashed . . . judicial lawmaking."⁸⁵ Leahy continued, "They rewrote the law to give ExxonMobil a \$2 billion windfall,"⁸⁶ attacking a 2008 decision that overturned a jury damages award to 40,000 families whose livelihoods were destroyed by the Exxon-Valdez oil spill.⁸⁷

Throughout the process of securing confirmation of Justice Stevens' successor, Elena Kagan, Democratic senators maintained unprecedented discipline in turning the tables on Republicans, branding the Supreme Court's conservative justices as "activists" of a conservative, pro-corporate genre.⁸⁸ The message caught the attention of media observers, who reported that "on 'activist judges,' the parties have 'switched sides.'"⁸⁹ The *New York Times*' Adam Liptak observed that the Democrats' nominee, Elena Kagan, "repeatedly said she would show 'great deference to Congress,'" but that, "[p]erhaps surprisingly, that was not what many [Republican] senators seemed to want to hear. They appeared to want the Supreme Court to save them from themselves."⁹⁰

B. *Progressive and Conservative Advocates Switch Sides on "Activism" and "Originalism"*

1. *Conservatives Embrace Libertarian Activism*

As Liptak's wise-crack reflected, it was not only progressives who had "switched sides" on judicial activism. In 2010, conservative pundits, advocates, and politicians executed a concerted about-face, unfurling a new approach, *Activist Judges, Please*, as George Will titled a January 14 column.⁹¹ Will

⁸⁴ 'Meet the Press' Transcript for April 11, 2011, *supra* note 80.

⁸⁵ *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2358 (2009) (Stevens, J., dissenting).

⁸⁶ 'Meet the Press' Transcript for April 11, 2011, *supra* note 80.

⁸⁷ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 481 (2008).

⁸⁸ 156 CONG. REC. S5220–23 (daily ed. June 22, 2010) (statements of Sens. Cardin, Whitehouse & Franken).

⁸⁹ Simon Lazarus, *Who's Ahead in the War over the Courts; After Kagan's Hearing and the First Court Skirmish over Health Reform?*, HUFFINGTON POST (July 16, 2010), http://www.huffingtonpost.com/simon-lazarus/whos-ahead-in-the-war-ove_b_649379.html; see also Stuart Taylor Jr., *Double Standards on Display in Kagan Hearings*, NEWSWEEK (June 30, 2010), <http://www.newsweek.com/2010/06/30/double-standards-on-display-in-kagan-hearings.html>; Glenn Thrush, *Dems Take Aim at Court Conservatives*, POLITICO (Apr. 13, 2010, 4:45 AM), <http://www.politico.com/news/stories/0410/35709.html>.

⁹⁰ Adam Liptak, *Kagan Reminds Senators: Legislation Is Your Job*, N.Y. TIMES, July 2, 2010, at A16, available at <http://www.nytimes.com/2010/07/02/us/politics/02assess.html>.

⁹¹ George F. Will, *Activist Judges, Please*, WASH. POST, Jan. 14, 2010, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/13/AR2010011303460.html> (published online as "That Rock in the Health-care Road? It's Called the Constitution.").

acknowledged that most conservatives “deplore, often with more vigor than precision, ‘judicial activism.’”⁹² But mistakenly so: “More truly conservative conservatives take their bearings from the proposition that government’s primary purpose is not to organize the fulfillment of majority preferences but to protect preexisting [sic] rights of the individual—basically, liberty. These conservatives favor judicial activism *understood as unflinching performance of the courts’ role in that protection.*”⁹³

As Will’s reference to “more truly conservative conservatives” indicated, there existed a conservative faction—libertarians—who for 25 years had scorned mainstream conservatives’ ritual encomiums for “judicial restraint” and aversion to “judges who legislate from the bench.” But this small cadre of academics and advocates, who had continued to champion pre-New Deal judicial constraints on federal economic regulatory authority, stood self-consciously outside the mainstream of conservative constitutional jurisprudence.⁹⁴ But at Elena Kagan’s confirmation hearing, Republican Judiciary Committee members, like their Democratic colleagues, read from a new playbook, as previewed by Will and like-minded conservative pundits and advocates. As framed by the opening statement of ranking Republican Committee member Jeff Sessions of Alabama, “Americans want a judge who will be a check on Government overreach, not a rubber-stamp.”⁹⁵ Texas Republican John Cornyn endorsed nothing less than replacing the Constitution as it has been interpreted since the New Deal, and restoring a very different “Framers’ Constitution,” in which “the Supreme Court has an important role in limiting the reach of the Congress.”⁹⁶ Oklahoma’s Tom Coburn railed at “the courts,” for not doing “their job in limiting our ability to go outside of original intent on what the Commerce Clause was supposed to be.”⁹⁷ None too subtly, the Republicans specifically targeted the health reform law and its allegedly “unprecedented” requirement that most Americans carry health insurance or pay

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See, for example, MACEDO, *supra* note 6, which contains a laudatory foreword by then-University of Chicago libertarian Richard Epstein and chapters titled, “The Framers of the Constitution v. Judge Bork,” “The Majoritarian Myth,” and “Principled Judicial Activism.” The history of conflict between libertarian and mainstream conservative legal thought-leaders is elaborated in Damon Root, *Conservatives v. Libertarians: The Debate over Judicial Activism Divides Former Allies*, FREE REPUBLIC (June 8, 2010, 8:07 PM), <http://www.freerepublic.com/focus/f-news/2530504/posts>. See also Kendall & Sugameli, *supra* note 6, at 2, 8.

⁹⁵ *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2010) [hereinafter *Nomination of Elena Kagan*] (statement of Jeff Sessions, Ranking Member, S. Comm. on the Judiciary).

⁹⁶ *Id.* at 160 (statement of John Cornyn, Member, S. Comm. on the Judiciary).

⁹⁷ *Id.* at 182 (statement of Tom Coburn, Member, S. Comm. on the Judiciary).

a penalty—a prelude, Coburn warned, for mandates to “eat three vegetables and three fruits every day.”⁹⁸

2. *Progressives Discover and Apply Text, History, and Deference to Congress*

Senator Cornyn’s yearning for a “Framers’ Constitution” reflected a notion repeated constantly by libertarian legal theorists and advocates, namely, that only in 1937 did the Supreme Court invent the current constitutional regime of expansive congressional authority and judicial deference to state as well as federal economic regulatory legislation.⁹⁹ Justice Clarence Thomas, the Supreme Court’s sole relatively consistent libertarian member, has called the New Deal Court’s 1937 shift a “wrong turn.”¹⁰⁰

For over two decades, no serious attempt was made to critically evaluate this libertarian shibboleth—that, measured against the Constitution, as “originally” written and “intended”—“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”¹⁰¹ However, as noted above, in the last several years, Yale law professors Akhil Amar and Jack Balkin have elaborately refuted this cramped version of the 1789 text and the intent of its Framers (who were, after all, known as “federalists”), along with the Swedish historian Max Edling.¹⁰² To them, no objective was more critical than

⁹⁸ *Id.* at 180

⁹⁹ A series of decisions in 1937 definitively rejected the so-called *Lochner* Era doctrinal apparatus that a conservative Supreme Court had deployed to abort numerous Progressive and New Deal Era reforms. *Lochner v. New York*, 198 U.S. 45 (1905), launched and has come to symbolize this notoriously activist anti-regulatory regime of the first third of the twentieth century. The case held that maximum hours regulation violated employers’ and employees’ “freedom of contract,” a “right” that the five-justice majority divined in the Fifth and Fourteenth Amendments’ ban on deprivation of liberty without due process of law. *Id.* at 64.

¹⁰⁰ *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring). D.C. Circuit Judge Janice Rogers Brown used more florid language. See Janice Rogers Brown, Assoc. Justice, Cal. Supreme Court, “A Whiter Shade of Pale”: Sense and Nonsense—The Pursuit of Perfection in Law and Politics, Speech to The Federalist Society at the University of Chicago Law School 12 (April 20, 2000), available at <http://www.communityrights.org/PDFs/4-20-00FedSoc.pdf>; see also, e.g., RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RICHARD EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

¹⁰¹ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994). To similar effect, Richard A. Epstein acknowledged that his interpretation of the original understanding of the commerce power would entail the “dismantling of large portions of the modern federal government.” Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1455 (1987).

¹⁰² See *supra* note 42 and accompanying text. Ron Chernow has brought the “original” Federalists’ priority imperative of building a strong and durable nation-state to a wide

empowering the new central government to ensure a robust national economy by countering balkanizing protectionist propensities on the part of the states and mercantilist policies of foreign governments. Their work has been effectively distilled by advocates for the constitutionality of the new health reform law. The Department of Justice has cited Balkin's article, *Commerce*, arguing "All this conduct by the uninsured—active and regular use of health care services, economic decisions as to how to pay for those services, migration in and out of insurance coverage, and shifting costs to other market participants—is, as Congress found, economic activity."¹⁰³ The Constitutional Accountability Center has filed amicus curiae briefs in several of the ACA legal challenges as well as written congressional testimony, noting that "[t]he Father of our Nation, George Washington, and the other delegates to the Constitutional Convention shared a conviction that the Constitution must establish a national government of substantial power," and detailing the specific provisions they drafted and the interpretations they contemplated to implement that "conviction."¹⁰⁴ Summarizing the thrust of the powerful "originalist" case for current expansive interpretations of congressional authority under the Commerce, Necessary and Proper, and General Welfare ("tax-and-spend") Clauses, I wrote in a February 2011 Issue Brief for the American Constitution Society:

If anything, it would be more accurate to view what libertarian critics call the New Deal Supreme Court's "revolution of 1937" as a restoration of the vision of the original Framers, who sought to supplant the feckless Articles of Confederation with a charter for effective and responsive national governance. That vision was given doctrinal form by the Framers' contemporary Chief Justice John Marshall and his fellow Supreme Court justices in the first third of the nineteenth century. In the century between Marshall's iconic decisions and the New Deal Court's reactivation of effective governance as a lodestar for

audience. See, e.g., RON CHERNOW, ALEXANDER HAMILTON (2005); RON CHERNOW, WASHINGTON: A LIFE (2010).

¹⁰³ Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 7, *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-00091-RV/EMT), 2010 WL 4949245 (citing Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 46–47 (2010)), available at <http://www.justice.gov/healthcare/docs/florida-mccollum-v-hhs-summary-judgment-opposition.pdf>; see also Brief of Amici Curiae State Legislators in Support of Defendants-Appellants, *supra* note 14, at 16–17; Simon Lazarus, *The Health Care Lawsuits: Unraveling a Century of Constitutional Law and the Fabric of Modern American Government*, AM. CONST. SOC'Y, 11–14 (Feb. 2011), http://www.acslaw.org/sites/default/files/lazarus_-_health_reform_lawsuits_0.pdf; Ian Millhiser, *Rally 'Round the "True Constitution,"* AM. PROSPECT (Aug. 25, 2009), http://prospect.org/cs/articles?article=rally_round_the_true_constitution; Ian Millhiser, *Why George Washington Would Disagree with the Right Wing About Health Care's Constitutionality*, THINK PROGRESS (Mar. 23, 2010, 8:00 PM), <http://thinkprogress.org/politics/2010/03/23/88253/cuccinelli-washington/>.

¹⁰⁴ Brief of Amici Curiae Constitutional Accountability Center in Support of Appellant and Reversal at 2–3, *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), 2011 WL 792217, at *2–3.

constitutional interpretation, the textual basis for robust federal authority was materially enhanced by the Reconstruction and Progressive Era Amendments.¹⁰⁵

3. *Warm-up for the Main Event: Conservatives' 1990s "Federalism" Boomlet and Progressives' Originalist Response*

By thus refuting libertarians' claim that the ACA (and the entire edifice of twentieth-century progressive government) is inconsistent with the text and original meaning of the Constitution, current progressives echo arguments made a decade ago, the last time conservatives threatened a major judicial rollback of Congress' post-1937 authority. This was the so-called "federalism revolution," in which the five-justice conservative bloc began in 1995 to discover heretofore unknown states' rights-oriented limitations on congressional power to implement the Commerce Clause and the Fourteenth Amendment. A series of 5–4 decisions contracting federal power in the name of "federalism" provoked vigorous dissents from the progressive justices, as well as strong protest from progressive and even some conservative opinion shapers and politicians. The progressive justices' case emphasized that the doctrinal initiatives the conservative justices had devised to shrink federal legislative authority flouted the text, original meaning, and, indeed, the intent of the Framers of the constitutional provisions which they purported to interpret.¹⁰⁶

In *Seminole Tribe of Florida v. Florida*, the conservative bloc held that an expansive concept of state "sovereign immunity" barred Congress from authorizing Indian tribes to sue states to enforce federal legislation enacted pursuant to the so-called "Indian Commerce Clause"—its specification that Congress may "regulate commerce . . . with the Indian tribes."¹⁰⁷ The majority

¹⁰⁵ Lazarus, *supra* note 103, at 4 (footnote omitted). Conservative and libertarian observers have taken note of claims by progressive scholars and advocates that the text and original meaning of the Constitution support the post-1937 vision of federal authority granted by the Commerce, Necessary and Proper, and General Welfare Clauses. See Calabresi & Fine, *supra* note 25; Damon W. Root, *Are We All Originalists Now?*, REASON.COM (Feb. 11, 2011), <http://reason.com/archives/2011/02/11/are-we-all-originalists-now>.

¹⁰⁶ See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 770–72 (2002) (Stevens, J., dissenting) (discussing how the late eighteenth century legislative history surrounding the passage of the Eleventh Amendment contradicted the holding of the justices writing for the conservative majority); *id.* at 772 (Breyer, J., dissenting) (arguing that eighteenth century history and the Framers' intent would permit the federal government to sue a State without consent); *United States v. Morrison*, 529 U.S. 598, 646 n.14 (2000) (Souter, J., dissenting) (referencing the 1787 Constitution to argue that judges who claim to be able to identify specific areas of state regulation immune from plenary congressional commerce power are denying constitutional history); *id.* at 647–48 (arguing that the majority's opinion in favor of the Court drawing the line between national and state interests contradicts the constitutional approach and philosophy of the Framers).

¹⁰⁷ 517 U.S. 44, 93 (1996).

acknowledged that the text of the Eleventh Amendment, on which the new doctrine was based, bars federal courts from entertaining only diversity of citizenship-based suits against state governments by "Citizens of *another* State," or foreigners.¹⁰⁸ But, the opinion contended, the Amendment should properly be read to mandate a far broader implicit "presupposition," namely, that a state government cannot be amenable to suit by an individual without its consent, because such immunity is "inherent in the nature of sovereignty" and each state is a "sovereign entity in our federal system."¹⁰⁹

In dissent, Justice Stevens contended that, far from being a "postulate" embedded by the Framers in the original design of the Constitution, sovereign immunity in eighteenth-century jurisprudence was "entirely the product of [English] judge-made [common] law" derived from royalist and established religion precepts, which were anathema to the revolutionary generation, and that Chief Justice Marshall had expressly confirmed that the Amendment should not be read broadly to enact an amorphous concept of protecting states' sovereign "dignity."¹¹⁰ Justice Souter elaborated on Justice Stevens' originalist case. He exhaustively reviewed the debates in the 1787 Philadelphia Convention, the post-Convention ratification debates, Chief Justice Marshall's key decisions, and other contemporaneous sources.¹¹¹ He also noted that "plain text" should necessarily trump the allegedly implicit "background principle[s]" and "postulates" on which the conservative majority purported to the new doctrinal weapon it had handed to them in Congress's legislative authority.¹¹² Justice Souter's eighty-five-page analysis relied heavily on scholarship by Akhil Amar and historian Gordon Wood.¹¹³

To underscore what they perceived as a historic threat posed by the conservative bloc's drive to retrench congressional authority, the four progressive justices, through their leader Justice Stevens, took the extraordinary step of refusing "to accept *Seminole Tribe* as controlling precedent."¹¹⁴ Justice Stevens explained that the open-ended doctrinal barrier to ensuring state compliance with federal law is "so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court."¹¹⁵ In the same vein, he elaborated:

¹⁰⁸ *Id.* at 54 (emphasis added).

¹⁰⁹ *Id.* (citations omitted).

¹¹⁰ *Id.* at 95–97 (Stevens, J., dissenting).

¹¹¹ *See id.* at 100–85 (Souter, J., dissenting).

¹¹² *Id.* at 116 n.13.

¹¹³ *See, e.g., Seminole Tribe*, 517 U.S. at 137, 152 n.47, 155, 160, 164 nn.57–58.

¹¹⁴ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part and concurring in part).

¹¹⁵ *Id.* at 97–98.

There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States. The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.¹¹⁶

Finally, Justice Stevens linked his text-and-original-meaning and Framers' intent arguments to judicial restraint, and sealed them together as a package spotlighting the conservative justices' "radical judicial activism":

The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.¹¹⁷

During the decade since he completed his originalist critique of the conservative justices' "federalism" offensive, Justice Stevens in particular has deployed similar themes attacking conservative efforts to cripple environmental regulation by expanding the doctrine of "regulatory takings,"¹¹⁸ to apply the Second Amendment to restrictions on individual gun ownership and use,¹¹⁹ and in particular, the conservative majority's 2009 expansion of the First Amendment to bar regulation of corporate political activity.¹²⁰ In the latter case, Stevens showcased his highly nuanced appreciation of the academic and

¹¹⁶ *Id.* at 96.

¹¹⁷ *Id.* at 98–99 (citations omitted) (disagreeing with the majority's opinion that Congress lacks power to abrogate state sovereign immunity against suits to enforce the Age Discrimination in Employment Act). *Seminole Tribe* launched a conservative trend of weakening federal powers by holding that Congress lacks the power to abrogate immunity against suits to enforce statutes implementing its Commerce Clause authority. 517 U.S. at 47. These other cases Justice Stevens listed extended the principle: *Alden* held that Congress lacked the power to abrogate a state's sovereign immunity from suits brought in state courts, and the *Florida Prepaid* cases found that federal patent and trademark statutes improperly abrogated states' sovereign immunity by applying the strict congruent and proportional test regarding the Fourteenth Amendment's Section Five enforcement power. *Alden v. Maine*, 527 U.S. 706, 707 (1999); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 630 (1999).

¹¹⁸ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

¹¹⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 636–81 (2008) (Stevens, J., dissenting).

¹²⁰ See *Citizens United v. FEC*, 130 S. Ct. 876, 929–80 (2010) (Stevens, J., concurring in part and dissenting in part).

judicial originalism debate (and implicitly disavowed embracing originalism of whatever stripe as an exclusively legitimate mode of interpretation). "As a matter of original expectations," he wrote:

[I]t seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy. As a matter of original meaning, it likewise seems baseless—unless one evaluates the First Amendment's "principles," or its "purpose," at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task. This case sheds a revelatory light on the assumption of some that an impartial judge's application of an originalist methodology is likely to yield more determinate answers, or to play a more decisive role in the decisional process, than his or her views about sound policy.¹²¹

Stevens also packaged textual, original intent and meaning, and anti-activist arguments in attacking the conservative majority's business-friendly jurisprudence narrowing the scope of federal and state statutes protecting consumers, employees, and others. In the summer of 2009, the conservative majority reached out to decide, as it had the previous January in *Citizens United*, a question not presented by a narrow petition for review. Their decision, in *Gross v. FBL Financial Services*, drastically tightened standards for proving violations of the Age Discrimination in Employment Act. Justice Stevens' dissent alerted advocates for aging, employee, and civil rights communities, their Capitol Hill allies, and court-focused media to the majority's contraction of age discrimination protections. Stevens called out the conservative bloc for its procedural and substantive activism: "unabashed judicial lawmaking," "especially irresponsible" for "choos[ing]" to answer a question that had "not been briefed" by the parties or the Justice Department, and adding that "the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent."¹²²

In the same vein, in 2001, Stevens also replied sharply when the conservative bloc turned the 1925 Federal Arbitration Act into a platform for empowering all employers nationwide to require employees to challenge employer violations of all state and federal laws in binding, mandatory

¹²¹ *Id.* at 951 (citations omitted). Elsewhere Justice Stevens observed of the conservative majority's originalist arguments:

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment. I have given several reasons why I believe the Constitution would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

Id. at 952 (footnote omitted).

¹²² *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2353, 2358 (2009) (Stevens, J., dissenting).

arbitration proceedings that are both employer-structured and employer-friendly. Dissenting in this case, *Circuit City Stores v. Adams*, Stevens wrote that “Today . . . the Court fulfills the original—and originally unfounded—fears of organized labor by essentially rewriting the text of [the Federal Arbitration Act] [An exhaustive review of its legislative history makes] clear that it was not intended to apply to employment contracts at all.”¹²³

4. Senator Whitehouse Tries Out Progressive Originalism

So far, in real-world constitutional debates, originalist types of arguments have been deployed almost exclusively by Supreme Court justices—in particular former Justice Souter and, especially, former Justice Stevens—as well as a still-small cadre of court-focused advocates. Progressive politicians, for the most part, have continued to shun engaging in constitutional argumentation of any stripe, preferring instead to rely on the don’t-twist-the-law-to-favor-the-big-guy theme in battles about the courts. However, one particularly thoughtful Judiciary Committee Democrat, Senator Sheldon Whitehouse of Rhode Island, has imaginatively fused the two approaches. Speaking on March 11, 2011, prior to an Alliance for Justice Panel, “Are Pro-Corporate Decisions Hurting Everyday Americans?”, Senator Whitehouse gave a constitutional, originalist, frame to his critique of pro-business Roberts Court decisions by branding them antithetical to the constitutionally prescribed role of the jury.¹²⁴ Within the “beautifully designed mechanism” of constitutional checks and balances, he said, “our nation’s Founders created . . . the jury . . . to ensure that everyday Americans retain a forum where they can get a fair shake against powerful interests.”¹²⁵ The Framers, he noted, “put the jury in three separate provisions of the Constitution and the Bill of Rights.”¹²⁶ He cited Blackstone and De

¹²³ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 129 (2001) (Stevens, J., dissenting).

¹²⁴ Senator Sheldon Whitehouse, Keynote Address at Equal Justice for All (Mar. 11, 2009), available at <http://afjjusticewatch.blogspot.com/2011/03/equal-justice-for-all-senator.html>, at 11:00–16:00. His list substantially matched the cases highlighted by Judiciary Committee hearings summarized above. See *Gross*, 129 S. Ct. at 2347; *Exxon Shipping Co. v. Baker* 554 U.S. 471, 476 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007); *Short-Change*, *supra* note 13; see also *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (barring individuals subject to binding mandatory arbitration agreements from challenging such agreements in court as unconscionable under pertinent state law); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (strengthening the application of *Twombly* to heighten pleading standards more broadly in federal civil courts); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling a 96-year-old antitrust precedent to hold that vertical price restraints were not illegal per se under section 1 of the Sherman Act); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (increasing the pleading requirements to survive a motion to dismiss for potential violations of section 1 of the Sherman Act).

¹²⁵ Whitehouse, *supra* note 124, at 5:35.

¹²⁶ *Id.* at 6:25–7:15.

Tocqueville for the crucial political role of the jury as understood in the early days of the republic, as “a mode of the sovereignty of the people.”¹²⁷ Senator Whitehouse’s argument was not inadvertent nor intended to be an isolated phenomenon. During the question-and-answer session following his remarks, he differentiated his approach from approaches traditionally favored by many of the court-focused progressive advocates in the audience. He advised them to “ground our arguments in really basic constitutional principles,” as he did, and stress the “impressive pedigree” of iconic figures from the founding period “behind progressive positions.”¹²⁸ He concluded, “the more we ground our arguments in those areas, the stronger we will be [but] if we are just talking about ‘rights,’ [it will be a harder sell].”¹²⁹

C. Why Does It Matter? Progressives Stress “Real-World Consequences”

Of course, even the most compelling demonstration that text and original meaning point to a progressive outcome—or, for that matter, a conservative outcome—is unlikely, standing alone, to carry the day with ordinary citizens, media representatives, politicians, or even judges. Before just about anyone, certainly anyone who is not a lawyer, decides which side to go with in an esoteric legal argument, they want to know what is at stake—why, to whom, and how much it matters. They want both the reassurance that a legal advocate or decision maker conscientiously follows pertinent legal provisions and rules and an understanding of the real-world consequences of alternative interpretations or doctrinal approaches. Too often, progressives have lost sight of the need to push both the legal theory and the practical consequences buttons, simultaneously. For example, during his September 2005 hearing, Chief Justice Roberts was challenged for systematically favoring the “big guy.” He shot back, “[I]f the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, well, then the big guy’s going to win, because my obligation is to the Constitution.”¹³⁰

Roberts’ retort silenced his interrogator, Senator Dick Durbin. To preempt such counter-attacks, Senate Judiciary Committee Democrats, the White House, and advocacy groups have learned to conspicuously link their populism with fidelity to the rule of law. They emphasize, as noted above, both that the Roberts Court threatened “everyday Americans” economic security, and that the conservative Justices were “activists” who “rewrote the law” to reach pro-

¹²⁷ *Id.* at 7:26.

¹²⁸ *Id.* at 39:13.

¹²⁹ *Id.* at 39:47.

¹³⁰ *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 448 (2005) (statement of John G. Roberts, Jr., Supreme Court Chief Justice nominee).

corporate results.¹³¹ Thus, progressive advocates sow skepticism about conservatives' legal argumentation by spotlighting its adverse practical consequences for constituencies traditionally uninterested in the culture war controversies that have dominated media and public perceptions of the wars over the courts and the Constitution.

While Senate Democrats and the Obama Administration have focused on their don't-twist-the-law-to-favor-the-big-guy theme, on the Supreme Court, Justice Stephen Breyer has sought to expound a broader response to conservative originalism that similarly emphasizes "look[ing] to *consequences*, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'" ¹³² Justice Breyer has put his theory into practice, for example, in his widely admired dissent from the Court's 5–4 2007 decision to strike down Louisville, Kentucky, and Seattle, Washington public school integration plans that included students' race among criteria for assigning them to schools. Justice Breyer detailed the long history of segregation and resegregation that the Seattle and Louisville school districts had sought to remediate, elaborating the options that had been tried, abandoned, allowed, disallowed, failed, and succeeded, however temporarily or partially. His seventy-two-page opinion started by emphasizing that "[t]he historical and factual context in which these cases arise is critical."¹³³ In addition to chiding the five-Justice majority for "distort[ing] precedent" and "misapply[ing] the relevant constitutional principles," Justice Breyer's principal line of attack on the majority's new "legal rules" is "that [they] will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, [they] threaten[] to substitute for present calm a disruptive round of race-related litigation, and [they] undermine[] *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality."¹³⁴

Another recent example of consequences-oriented advocacy, on an issue kindred to that at stake in the Louisville-Seattle integration cases, was the contentions made in amici curiae briefs filed by national business leaders and retired military officers in the 2003 higher education affirmative action case, *Grutter v. Bollinger*.¹³⁵ Although not themselves ordinarily considered progressive in their own outlook, these two groups made arguments about the

¹³¹ See *supra* notes 51–61 and accompanying text.

¹³² STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 18 (2005) (quoting LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (Irving Dilliard ed., 3d ed. 1960)).

¹³³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 804 (2007) (Breyer, J., dissenting).

¹³⁴ *Id.* at 803–04.

¹³⁵ See Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056; Consolidated Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 1787554.

real-world issues at stake that proved compelling to swing-Justice Sandra Day O'Connor. In her words, writing for the five-Justice majority that voted to uphold the University of Michigan Law School's affirmative action student selection criteria, Justice O'Connor noted that the business leaders' brief "made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints"; similarly, she quoted the military leaders' brief's contention that a "highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principle [sic] mission to provide national security."¹³⁶ The military officers' brief was expressly referenced during the oral argument by Justice Ginsburg and Justice Kennedy.¹³⁷

Such approaches to constitutional argumentation were famously pioneered by Louis Brandeis as an advocate a century ago, before his nomination to the Supreme Court. Like his "Brandeis briefs," these contemporary efforts undermine the credibility of abstract doctrines invented by conservative legal advocates and judges by underscoring their destructive impact on efforts by democratically elected institutions to address grave and difficult societal problems. For example, contemporary conservatives insist, contrary to the text and, especially, the history, of the Fourteenth Amendment, that its Equal Protection Clause mandates rigid "color-blind" rules that cripple efforts to encourage racial diversity.¹³⁸ This substitution of ideological abstraction for text-and-history-grounded interpretation is on par with the *Lochner* Court's invocation of the "freedom of contract" shibboleth to invalidate legislation addressed to wages, hours, and other working conditions important to the welfare of industrial workers.¹³⁹

As illustrated by these examples, effective consequence-oriented advocacy includes three important components. First, arguments about adverse real-world effects are complemented by arguments attacking the opponents' technical legal case. Second, ideally, the particular adverse consequences spotlighted target issues and constituencies calculated to expand the base of support for progressive goals at stake. For example, the Senate Judiciary Committee's hearings are aimed at raising the consciousness of "everyday Americans" about the impact of the Supreme Court on pocketbook issues important to them. The *Grutter* briefs' spotlighting of national business and military needs appeal to concerns, constituencies, and judges—such as Justice O'Connor—likely to be indifferent or even presumptively hostile to the idea of racial preferences.

¹³⁶ *Grutter*, 539 U.S. at 330–31.

¹³⁷ Oral Argument at 5:24, 10:10, *Grutter*, 539 U.S. 306 (No. 02-241), available at http://www.oyez.org/cases/2000-2009/2002/2002_02_241/argument. The military brief was principally written by Virginia Seitz, then a partner in Sidley Austin LLP, recently confirmed as President Obama's Assistant Attorney General for the Office of Legal Counsel.

¹³⁸ See *Parents Involved*, 551 U.S. at 804.

¹³⁹ *Lochner v. New York*, 198 U.S. 45, 64 (1905); see also *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923); *Hammer v. Daggenhart*, 247 U.S. 251, 269 (1918).

Justice Breyer's focus on the conservative majority's indifference to local elected school boards appeals likewise to moderates' and traditional conservatives' commitment to judicial restraint and deference to democratic decision making.¹⁴⁰

The third element typically associated with progressive advocacy emphasizing the adverse practical consequences of conservative positions is a link to the purpose of the provisions of the Constitution or statute at issue, and the glaring anomalousness of those consequences in light of that purpose. Justice Breyer counsels judges, when faced with "ambiguous text," to "rely heavily on purposes and related consequences."¹⁴¹ Following his own advice, after detailing the adverse consequences for local racial diversity efforts of the Louisville-Seattle schools decision, his punch-line invoked the fundamental purpose of the Fourteenth Amendment on which the majority purported to rely; consequences so grave and detrimental to racial equality, he concluded, "cannot be justified in the name of the Equal Protection Clause."¹⁴²

Contrasting regressive consequences with progressive purposes is especially common, and can be especially effective, as a means of undermining the credibility of statutory interpretations that narrow or nullify the protections or benefits the statutes were enacted to provide. A good example is Justice Ginsburg's dissent in the *Ledbetter* case. As noted above, she showed that the majority's interpretation of the statute of limitations provision of Title VII rendered useless its core guarantee of equal pay opportunity.¹⁴³ Her compelling description resonated broadly, gaining sympathetic attention from people who ordinarily take no notice of Supreme Court decisions, but who know well employers' secretiveness about what they pay individual employees. In similar terms, also noted above, Senator Leahy upbraided the Court's conservative bloc for decisions that, like *Ledbetter*, turned consumer and employee protection laws "on their heads, . . . making them protections for big business rather than for ordinary citizens."¹⁴⁴ Likewise, Justice Stevens repeatedly detailed how

¹⁴⁰ Distinguished Republican appellate appointees rejected the *Parents Involved* majority's result and reasoning on pragmatic deference grounds parallel to Justice Breyer's reasoning in his dissent. See *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27–29 (1st Cir. 2005) (Boudin, C.J., concurring). Brandeis' focus on the horrific working conditions that Progressive Era workplace regulatory legislation was intended to rectify similarly complemented arguments anchored in judicial restraint, at least as reinforced by points such as Justice Oliver Wendell Holmes' iconic statement in his *Lochner* dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. at 75 (Holmes, J., dissenting).

¹⁴¹ STEVEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 81 (2010).

¹⁴² *Parents Involved*, 551 U.S. at 804 (Breyer, J., dissenting).

¹⁴³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting).

¹⁴⁴ *Short-Change*, *supra* note 13, at 1; see also *Courting Big Business*, *supra* note 53.

improbable or cramped interpretations produced consequences at odds with the major, generally progressive, purposes behind statutes.¹⁴⁵

IV. WHERE TO GO FROM HERE: SOME SUGGESTIONS

In the race to dominate the politics of the Constitution and the courts, conservatives and progressives have traded places. Compared to their respective positions through the last third of the twentieth century, conservatives are now Hertz, progressives are Avis. Progressives are behind. To catch up, they need to try harder. Above all, they need to try smarter, to recapture command of Americans'—and, indeed, major progressive constituencies'—vision of what the Constitution means, why it matters, and what judges (as distinguished from legislators, presidents, and voters) should—and should not do—to realize that vision.

A. Update the Threat Assessment and Upgrade the Strategy

The first challenge for progressives is to update their assessment of the threat from the right's agenda for the Constitution and the courts, and upgrade the priority assigned to countering that threat. As is increasingly recognized, the problem is no longer simply that personal and civil liberties created by the Warren and Burger Courts could be (and are being) stripped away. For sure, that prospect is real. But it is now subsumed by two new levels of threat that are potentially existential for progressive governance. First, as embodied most visibly by the ACA legal challenges, the libertarian rise within conservative legal circles, paralleling the Tea Party's political surge, targets the constitutional regime prioritizing effective and responsive national governance first recognized by Chief Justice Marshall and reaffirmed by the New Deal Court after 1937.¹⁴⁶ In principle, this agenda puts at risk the entire edifice of progressive laws and programs built during the twentieth century, as well as the major enhancements added by President Barack Obama and the 111th Congress. As noted above, Republican politicians are in no way shy about touting this activist agenda, evidently banking on net political gains from

¹⁴⁵ Harvard law professor John F. Manning (among others) has written that Justice Stevens was:

[T]he Court's most vocal and, I believe, the ablest defender of . . . the post-New Deal consensus on statutory interpretation: the idea that legislation is a purposive act, and that judges should interpret acts of Congress to implement the legislative purpose, even if it requires some deviation from the semantic detail of the enacted text [to avoid consequences at odds with the legislative purpose].

John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 *FORDHAM L. REV.* 2009, 2009 (2006).

¹⁴⁶ See, e.g., Lazarus, *supra* note 14, at 5–9 (attempting to detail the doctrinal components of the Marshall—post-New Deal—regime and the radically different components of the libertarian regime advanced by the ACA legal challenges).

espousing a judiciary bent on “check[ing] . . . government overreach.”¹⁴⁷ As observed by Jeffrey Toobin in September 2010:

For the first time since Franklin D. Roosevelt battled the Supreme Court over the New Deal, a Democratic President is seeking to strengthen and expand the regulatory power of the federal government, and his opponents, as in the nineteen-thirties, are fighting back in the courts. A legal assault on President Obama’s agenda has begun, and his adversaries have already won several important [if inconclusive] victories.¹⁴⁸

Less widely noted, but no less menacing to progressive political and statutory accomplishments, the Roberts Court has intensified the multi-front campaign carried on for two decades under Chief Justice Rehnquist, to nullify progressive laws through a myriad of non-constitutional techniques.¹⁴⁹

The second new existential threat from the Right is the blatant drive to turn constitutional text, history, and precedent upside-down in order to stack the political deck against Democrats and progressive constituencies, and decisively advantage Republicans and conservative constituencies. With only a one vote majority, and in the face of scathing dissents and criticism, the Rehnquist and Roberts Courts have: reversed a state supreme court’s reasonable interpretation of its own election law to ensure the election of a Republican president;¹⁵⁰ turned a resolutely blind eye to sanction Republican legislatures’ machinations to disenfranchise elderly, minority, student, and other progressive constituencies no less overt than the poll tax in the pre-1965 deep South;¹⁵¹ overturned a

¹⁴⁷ *Nomination of Elena Kagan*, *supra* note 95, at 7 (statement of Jeff Sessions, Ranking Member, S. Comm. on the Judiciary).

¹⁴⁸ Jeffrey Toobin, *Without a Paddle: Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, NEW YORKER, Sept. 27, 2010, at 34.

¹⁴⁹ See *Courting Big Business*, *supra* note 53; *Short-Change*, *supra* note 13; Simon Lazarus, *Repealing the 20th Century*, AM. PROSPECT (Dec. 12, 2007), http://prospect.org/cs/articles?article=repealing_the_20th_century; Simon Lazarus & Harper Jean Tobin, *The Supreme Court’s Two-Front War on the Safety Net: A Cautionary Tale for Health Reformers*, AM. CONST. SOC’Y (Jan. 30, 2009), http://www.acslaw.org/sites/default/files/Lazarus%20Tobin%20Issue%20Brief_0.pdf. The extensive academic and judicial literature is treated by William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett in WILLIAM N. ESKRIDGE JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* (2d ed. 2006). These experts observe that “skewering the interpretation of a statute may involve as much judicial activism as declaring it unconstitutional,” that canons of interpretation that the Rehnquist and Roberts conservative blocs have made a principal tool are “notoriously manipulable and dynamic,” and that the conservative justices’ “federalism canons” in particular are “part of an overall judicial plan to limit federal power in modern America.” *Id.* at 359, 374, 385.

¹⁵⁰ See *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁵¹ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). In a July 6, 2011 speech, former President Bill Clinton observed, “There has never been in my lifetime, since we got rid of the poll tax and all the Jim Crow burdens on voting, the determined effort to limit the franchise that we see today,” citing measures pending or enacted by Republican

century of constitutional precedent and pervasive legislative practice to green-light unprecedented billions of dollars in anonymous corporate political investment;¹⁵² and crippled public funding strategies to reduce the dominance of financial power in politics.¹⁵³

B. *Make Messaging Work Beyond Progressive Echo-Chambers*

As noted above, the reasons why progressives have fallen behind in shaping the constitutional agenda include socio-political “structural” circumstances that cannot be willed away merely by tweaking messaging strategies. Nevertheless, getting the message or messages right, and communicating them effectively, is an essential prerequisite to turning this tide. That means finding the discipline to:

- Discard approaches that resonate within coastal and campus progressive echo-chambers but fall flat or backfire with broader sectors of the public, opinion-shapers, and the political class.
- Develop strategies that persuade non-court-focused progressive constituencies—and moderate constituencies—that they have a significant stake in the war over the courts and the Constitution.

The three emergent new progressive messaging strategies identified in the previous section of this article have potential for satisfying the above criteria—if they are rigorously and consistently deployed.

1. *Clone the Ledbetter Template*

“Don’t-twist-the-law-to-favor-the-big-guy” has demonstrated its potential for engaging constituencies heretofore indifferent to court-related issues. The primary piece of evidence is the reaction of the public, and of politicians, to the *Ledbetter* case, discussed above.¹⁵⁴ That history seems to indicate that, while media representatives and politicians tend at first blush to turn up their noses at disputes over legal minutiae between businesses or other large organizations and workers, consumers, retirees, depositors, or the like, the very “ordinariness” of the individual protagonists and their stories of mistreatment have great potential to resonate, if brought to the attention of equally ordinary voters. The challenge for progressives is to find the will, the skill, and the resources to get those stories down to the grass roots, and keep them coming.

legislatures in Florida, Wisconsin, New Hampshire, and Ohio. Darren Samuelsohn, *Clinton Likens GOP Effort to Jim Crow*, POLITICO (July 6, 2011, 1:08 PM), <http://www.politico.com/news/stories/0711/58419.html>.

¹⁵² See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

¹⁵³ See *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

¹⁵⁴ See *supra* Part III.A.2.

In the *Ledbetter* situation, Justice Ginsburg first sparked media attention by reading her passionate dissent from the bench. Following up, leading women's rights organizations skillfully executed a sustained campaign to disseminate the story of how Lilly Ledbetter's employer systematically short-changed her, and the absurd injustice of the Supreme Court's rationale for reversing the jury verdict in her favor. The campaign also benefitted greatly, initially in 2007 and 2008, from committed and skillful leadership from House leaders Rosa DeLauro and George Miller and Senator Ted Kennedy, then from presidential candidate Barack Obama's decision to make Ledbetter a visible accessory to his 2008 campaign.

Even before Obama adopted the cause during the summer of 2008, the impact on the electorate of the Ledbetter messaging campaign registered, when in April of that year, six Republicans broke ranks to support a nearly successful motion to end the filibuster against the Democrats' "fix" legislation. Moreover, a credible argument can be made that the sharp public reaction and Congress' swift reversal of the Supreme Court's decision prompted the Court's conservatives to trim their sails and confound veteran court observers by ruling for plaintiffs in five of the six employment discrimination cases heard during the subsequent 2007–2008 Term.¹⁵⁵ At the beginning of the Term, four months after the *Ledbetter* decision, observers read the Court's grants of review in at least three of these cases as portending its extending the pro-employer thrust of *Ledbetter* and further overruling or hollowing out governing precedent.¹⁵⁶ That conservative justices joined the four progressive justices to do just the opposite may have been a reaction to the public and legislative backlash to their original 2007 decision.¹⁵⁷

In addition to the *Ledbetter* case and subsequent legislative campaign, at least one other business-friendly Supreme Court decision, the *Citizens United* ruling barring restrictions on corporate political activity, struck a public nerve. President Obama's 2010 State of the Union criticism of the decision, plus Justice Alito's spontaneous display of anger in the audience, no doubt helped to catch public attention. *Citizens United* is an especially compelling exhibit for

¹⁵⁵ See Charles A. Shanor, *Employment Cases from the 2007–2008 Supreme Court Term*, A.B.A., 4 (Sept. 2008), http://www.americanbar.org/content/dam/aba/migrated/labor/lcl-pdf/scu_2008.authcheckdam.pdf.

¹⁵⁶ See, e.g., *The Roberts Court Round Three: What to Look For*, CTR. FOR AM. PROGRESS (Oct. 1, 2007), http://www.americanprogress.org/issues/2007/10/roberts_court_tp.html.

¹⁵⁷ The *New York Times*' Linda Greenhouse observed:

Perhaps the conservative justices were taken aback by the public response to the Lilly Ledbetter case . . . [which] led to Congressional hearings during which the court was denounced as out of touch with the reality of women's working lives. A bill to overturn the decision failed in the Senate, but came close.

Linda Greenhouse, *In Latest Term, Majority Grows to More than 5 of the Justices*, N.Y. TIMES, May 23, 2008, at A1.

the case progressives need to be making, as it shows the conservative bloc so eager to change the law to favor business interests that it was willing to reach out to decide issues not originally argued by any party to the case, willing to overturn a century of precedent and practice, and willing to rely on a legal theory—equating corporations with living persons for First Amendment purposes—that strikes ordinary people as perverse. Justice Stevens' messaging in his ninety-page dissenting opinion included these thrusts:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, . . . [b]ut they are not themselves members of "We The People" by whom and for whom our Constitution was established.

....

... Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907 The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce* [a recent precedent overturned by *Citizens United*].

....

... Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.

....

... The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.

In addition, *Citizens United* validates the claim that the conservative Justices are not above rigging political competition to favor their patrons and allies. As Justice Stevens observed, "The Court's ruling threatens to undermine the integrity of elected institutions across the Nation."¹⁵⁸

Conservative court-watchers have taken note, as *National Review*'s Ramesh Ponnuru recently wrote, "The idea that the Supreme Court is too pro-business is rapidly becoming the central liberal critique of the institution," and, during Justice Kagan's confirmation hearings, "Democrats made their theme the need to counter pro-business activism by the conservatives on the court." Ponnuru also noted that the Democrats' messaging strategy was catching on, that "[p]ress coverage has mostly echoed" their line—for example, summing up the

¹⁵⁸ *Citizens United v. FEC*, 130 S. Ct. 876, 930, 932, 942, 972 (2010) (Stevens, J., concurring in part and dissenting in part).

2010–2011 term, Reuters “ran the headline, ‘Big business scores key Supreme Court wins.’”¹⁵⁹

But, while progressive forces have demonstrated the effectiveness of their “don’t-twist-the-law-to-favor-the-big-guy” message, they have deployed the strategy only spottily. For its part, as soon as Justice Kagan was confirmed, the Obama Administration lost visible interest in the message and, for that matter, in the battle for the courts in general. The White House has fought Republicans’ stonewalling of its lower court nominees exclusively as an inside game, and somewhat fitfully at that. There has been little, if any, public spotlighting of Republican obstructionism on this front. More importantly, no attempt has been made to keep before the press the rationale honed during Justice Kagan’s confirmation as to why this partisan judicial nominations struggle matters—the need for judges who uphold laws that protect ordinary Americans’ interests. The Administration has not availed itself of the multiple opportunities presented by Supreme Court cases about *Ledbetter*-like issues to underscore the Judiciary’s threat to unravel pocketbook legal protections (simultaneously showcasing the President’s attentiveness to ordinary people’s basic needs). The Administration could, for example: send high-level witnesses to testify in hearings before the Senate Judiciary Committee and other committees; intervene aggressively in cases before the Supreme Court and lower courts; promote enactment of corrective legislation like that which Obama signed into law to overturn the *Ledbetter* decision; and generally highlight its initiatives, actions, and battles on pocketbook issues (such as Elizabeth Warren’s struggle to launch and head the Consumer Financial Protection Bureau created by the Dodd-Frank Wall Street Reform and Consumer Protection Act).

For their part, progressive groups and leaders have themselves not always grasped the potential illuminated by the *Ledbetter* example. As one apparent example, senior advocacy groups failed to match the women’s groups’ *Ledbetter* success and respond forcefully to the Court’s similar 2009 *Gross* decision that weakened age discrimination protections. Like Justice Ginsburg, Justice Stevens sought to spark such a campaign with a fiery dissent denouncing the conservative majority’s irresponsible “judicial lawmaking.”¹⁶⁰ House and Senate leaders who managed the *Ledbetter*-fix legislation saw the case as low-hanging fruit, an opportunity to show their solicitude for older workers, as well as a likely legislative victory. They immediately sought to organize a repeat effort to overturn *Gross*, introduced legislation within weeks of the decision,

¹⁵⁹Ramesh Ponnuru, *Supreme Court Isn’t Pro-Business, but Should Be*, BLOOMBERG (July 5, 2011, 12:01 AM), <http://www.bloomberg.com/news/2011-07-05/supreme-court-isn-t-pro-business-but-should-be-ramesh-ponnuru.html>; James Vicini, *Analysis: Big Business Scores Key Supreme Court Term Wins*, REUTERS (June 28, 2011, 3:29 PM), <http://www.reuters.com/article/2011/06/28/us-usa-court-business-idUSTRE75R68X20110628>.

¹⁶⁰*Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2358 (2009) (Stevens, J., dissenting).

and quickly held hearings.¹⁶¹ It seemed to observers that Jack Gross, the discrimination victim and 54-year-old mid-level executive whose jury award the Supreme Court nullified, had no less potential than Lilly Ledbetter to provoke widespread sympathetic concern as an “everyday American.” The Chamber of Commerce was open to negotiating a consensus bill, and, indeed, discussions between the Chamber and a coalition led by the Leadership Conference on Civil and Human Rights appeared, for a time, to be heading toward a bipartisan bill that would pass without opposition. But senior advocates, focused on enacting the ACA and defending the major senior benefit programs, launched no campaign to turn Jack Gross into the sort of national symbol of age discrimination that Lilly Ledbetter became for gender discrimination. The impetus necessary to maintain the issue as an action item on the crowded legislative agenda faded, and the bill died. An opportunity to alert a major constituency to the threat to its interests posed by a conservative judiciary was squandered.

In sum, progressives, in and out of government, have the “don’t-twist-the-law-to-favor-the-big-guy” message down, but they have not uniformly seen the need, nor grasped available means, to get it out.

2. *Embrace the Civics Class Canon*

As noted above, some progressives, principally academics, persist in making an issue of “originalism.” They deride emphasis on constitutional text and history, as lacking intellectual integrity or even as capitulation to the enemy, while inaccurately crediting conservatives’ gains in the political wars over the courts to their originalist credo.¹⁶² To be sure, as an academic exercise, debating originalism, or other interpretive methodological “-isms,” is entirely appropriate. But, from the standpoint of successful legal and political advocacy, this preoccupation with originalism is misplaced and a highly counterproductive distraction. To begin with, it conflates originalism as a legal philosophical concept (or concepts) with originalism as a political slogan. In the latter capacity, its value to conservatives has nothing to do with the components of originalist jurisprudence or the issues debated by academics. Originalism works, politically, because it is, as many have observed, a handy “dog-whistle.”¹⁶³ To

¹⁶¹ See, e.g., *Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers from Discrimination: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 111–396 (2009).

¹⁶² See Siegel & Post, *supra* note 27; Geoffrey R. Stone, *The Demise of “Originalism,”* HUFFINGTON POST (June 5, 2011, 12:17 PM), http://www.huffingtonpost.com/geoffrey-r-stone/the-demise-of-originalism_b_871502.html.

¹⁶³ See, for example, Ed Kilgore in *The New Republic* on October 14, 2010: “When Sharron Angle wasn’t saying something outrageous, she was blowing dog whistles, repeatedly invoking constitutional originalism and the Tenth Amendment, those hardy perennial symbols of the Tea Party’s desire to return domestic governance to the size and power they maintained during the Coolidge Administration.” Ed Kilgore, *Sharron Angle’s*

Republicans' social conservative base, it has signaled hostility to abortion rights, gay rights, and strict church-state separation. For the general public, professing fidelity to what is actually written in the Constitution, like any legal document, and what the people who drafted or ratified it thought those words meant, just seems like an innocuous verity—a plank from the civics class canon noted above. To declare oneself *against* such a common-sense approach to interpreting the Constitution comes across as validating that liberals or progressives want judges who will make up the law as they go along, just as conservatives say they do. But that is not because ordinary people subscribe to originalist philosophy in any of its versions.

Furthermore, Americans regard their Constitution not simply as law in the sense that a statute or a judicial decision is law. They revere the Constitution as the sacred text of the nation's secular faith. Despite the fact that constitutional lawyers, law-teachers, and students focus on the decisions interpreting the Constitution in a fashion that resembles common law decision making, as far as the rest of the nation is concerned, "The Constitution" is The Document itself. As Professor Tribe has noted, "The frequently voiced observation that the Constitution is America's 'civil religion'—its one unifying, if recognizably imperfect, scripture—*appears to address the written text and what ordinary citizens might make of it more than the gloss that generations of judicial rulings have placed on it.*"¹⁶⁴ In the same vein, constitutional historian Jack Rakove recently observed, "What's uniquely enduring about the document is how deeply Americans are wedded to it." He added, "The idea of having a written constitution as the original supreme fundamental source of law was an American invention [Now] [w]e're very reluctant to amend it. The idea of rethinking decisions made in 1787 scares some of us to death."¹⁶⁵

Enthusiastically embracing—instead of deriding—Americans' investment in their sacred text and its framers should hardly require progressives to grit their teeth. On the contrary, progressives are among those who—with good reason—have been most fearful of spasmodic drives over the past few decades for major constitutional amendments or, worse, the calling of a constitutional convention.¹⁶⁶ And with good reason. It is hardly likely that such a convention

Self-Parody vs. Harry Reid's Missed Chances, NEW REPUBLIC (Oct. 14, 2010, 10:56 PM), <http://www.tnr.com/blog/jonathan-cohn/78411/harry-reids-missed-chances>.

¹⁶⁴ LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 17 (emphasis added). He adds, "[N]ot many people [other than constitutional law professionals] would confuse the Supreme Court's sequence of pronouncements on constitutional matters with 'The' Constitution." *Id.*

¹⁶⁵ Interview by Ever Gerber with Jack Rakove, *supra* note 42.

¹⁶⁶ The history—reflecting the pattern of controversial conservative amendments opposed by progressives—is recounted in James Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1009 (2007), available at http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No3_Rogersonline.pdf. In the 1960s, state governments dominated by rural districts deprived of power by the Supreme Court's reapportionment decisions, *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*, pressed hard and at one point had

could replace the words in the current Constitution with words equally consonant with progressive values.

Moreover, decades of progressives' inattention to what the Framers wrote, and the historical record of what they meant, has left the field open to conservative and libertarian scholars and advocates. Predictably, they have propagated—unanswered—ludicrous claims that the original understanding mandated a feckless national government more akin to the Articles of Confederation the Framers sought to replace than the guarantees of a robust economy, national security, and individual rights which they carefully designed into the actual Constitution.¹⁶⁷ Already lost, at least for many years and decades, are opportunities progressives have squandered by ignoring, and failing to reinstate into Supreme Court precedent, the original understanding of the Reconstruction Amendments that the post-Civil War Court cast aside.¹⁶⁸

mobilized thirty-three state applications to Congress, one state shy of the two-thirds majority required by Article V of the Constitution to compel the calling of a convention by Congress. A decade later, a similar near-two-thirds majority of states calling for a convention to adopt a balanced budget amendment provoked a favorable vote for an individual such amendment in the Senate. *Id.* at 1009–10.

¹⁶⁷ Akhil Amar elaborates in detail the “geostrategic” focus of the Framers, and their view that a strong central government was a prerequisite to securing all the goals specified in the Preamble to the Constitution—“Individual and collective liberty, common defense and domestic tranquility, justice between men and between regions, economic prosperity and general welfare,” AMAR, *supra* note 37, at 3–54. Max Edling similarly sees the Framers’ priority to create a strong central government to remedy the erstwhile colonies’ “most pressing problem [is] . . . the inability of the new Congress to protect either the union’s territorial integrity or its commercial interests.” EDLING, *supra* note 42, at 220. Despite the similarity of their respective arguments, neither name appears in the other’s index.

¹⁶⁸ During the 1950s and 1960s, while securing the invalidation of *Plessy v. Ferguson*’s separate-but-equal emasculation of the Fourteenth Amendment, and the upholding of the Kennedy–Johnson civil rights legislation of the 1960s, progressive legal advocates and judges declined to replace the raft of post-Civil War decisions, other than *Plessy*, which systematically dismantled the three Reconstruction Amendments as written and as their Framers intended them to be applied. A contrary course could have yielded a compelling text-and-original meaning basis for progressive positions on most or all of the hot-button civil rights issues of recent decades: affirmative action; federal protections for violence against women; congressional authority to prevent private interference with rights created by the Reconstruction Amendments, not simply “state action”; and congressional authority to “enforce” the Reconstruction Amendments consonant with its fulsome authority to secure other constitutional powers under the Necessary and Proper Clause. *See, e.g.*, Balkin, *supra* note 40; Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 507–08 (2001); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717 (2003); Michael E. Levine, Note, *The Strange Career of “State Action” Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965); David Gans & Doug Kendall, *The Shield of National Protection: The Text and History of Section 5 of The Fourteenth Amendment*, CONST. ACCOUNTABILITY CTR. (2009), http://www.theconstitution.org/upload/fck/file/File_storage/CAC_Shield_of_National_Protection.pdf; Nathan Newman & J.J. Gass, *A New Birth of Freedom: The Forgotten History of*

Progressives have a compelling—and accurate—constitutional narrative to tell, and they should welcome the opportunity to share it. As Dawn Johnsen has written, “Progressives should emphasize, far more than they typically do, their fidelity to constitutional text and structure, and that they, no less than conservatives, seek to give meaning to the words and design of that great document.”¹⁶⁹ E.J. Dionne shows the way in his 2011 Independence Day *Washington Post* column, demolishing Texas Governor Rick Perry’s counterfactual sound bite that the Framers intended the national government to be a mere “agent for the states.” “No,” Dionne says, “our Constitution begins with the words ‘We the People’ not ‘We the States.’ The Constitution’s Preamble speaks of promoting ‘a more perfect Union,’ ‘Justice,’ ‘the common defense,’ ‘the general Welfare’ and ‘the Blessings of Liberty.’ These were national goals.”¹⁷⁰

Instead of vainly flailing at “originalism,” progressive advocates (and judges and politicians) should be taking Dionne’s tack: exploiting the wealth of opportunities presented by the text and history of the Constitution to validate both their general commitment to the document, and its progressive character; targeting specific issues; and grounding their arguments in constitutional text and history wherever appropriate. Given conservatives’ appetite for expanding their constitutional agenda to support their political and policy agendas, the list of critical issues on which rigorous, good-faith text-and-history analysis should embarrass them and favor progressives, already long, can only grow.

In general, progressives should be positioning themselves as the true keepers of the constitutional flame, in contrast with politically driven activists bent on restoring a pre-New Deal regime that respects neither the needs of ordinary people nor legal text, history, or precedent. In the 1980s, when even most Republican appointees to the federal courts endorsed strong congressional domestic regulatory authority and effective judicial protection for civil rights and liberties, it may or may not have made sense for progressives to flaunt indifference to the document’s words and original meaning, as some progressives did, however inadvertently.¹⁷¹ But it hardly makes strategic sense now, when many federal circuits, and, especially, the Supreme Court, are

the 13th, 14th, and 15th Amendments, BRENNAN CTR. FOR JUSTICE (Jan. 1, 2004), http://brennan.3cdn.net/a8927140bc5b1483e7_fxm6b98k1.pdf.

¹⁶⁹ Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL’Y REV. 239, 252 (2007).

¹⁷⁰ E.J. Dionne Jr., Op-Ed., *Duel over a Declaration*, WASH. POST, July 4, 2011, at A15.

¹⁷¹ This habit has not entirely disappeared. For example, University of Virginia Law Professor Christopher Jon Sprigman, writing in *Slate* in February 2011, could not suppress this extravagant condescension: “Blame the Founding Fathers. And blame us for our absurd fetishization of them and the increasingly time-worn document they created. Because we’re determined to run a post-industrial democracy by reference to a vague, terse, pre-industrial Constitution, we get judicial opinions that read like political arguments.” Christopher Jon Sprigman, *First Do No Harm: Why Judges Should Butt Out of the Fight over Health Care Reform*, SLATE (Feb. 11, 2011, 5:21 PM), <http://www.slate.com/id/2284664/>.

dominated by hard-line conservatives—in reality, on a broadening array of issues, unabashed reactionaries. As Justice Stevens famously observed, without exception, the Republican appointees to the current Supreme Court stand to the right of all members of the Court to which he was appointed.¹⁷² They have the power, or the lions' share of it. Progressives need to be holding fast to The Law. If one wants a glimpse of what an early twenty-first century living constitution would look like, read *Citizens United* or the decisions of movement conservative District Judges Henry Hudson and Roger Vinson nullifying two centuries of Commerce Clause and Necessary and Proper Clause jurisprudence en route to invalidating the ACA individual mandate.¹⁷³

To connect with sectors of the electorate outside their own echo chamber, progressive advocates need not support, oppose, or mention originalism, or any other jurisprudential “-ism.” They need only take care to harmonize their appeals with the civics class canon noted above. Having a larger constitutional vision is important in arguing some issues and essential for anchoring particular positions and establishing priorities. But in my view this does not require invention. The constitutional vision or visions that progressives need to defend in the first years of the twenty-first century are already defined; they include, at least: the common vision of a charter for effective, responsive, and compassionate national governance prescribed by the Constitution, its amendments, Chief Justice Marshall's decisions, and the post-New Deal decisions as qualified by *Carolene Products*' footnote four;¹⁷⁴ and the vision of a “New Birth of Freedom” sketched in the Gettysburg Address and set out in the Reconstruction Amendments. No doubt the list could be expanded. But progressive advocates do not need their own “ism” to stand up to conservative originalism.

In academic fora, there is of course nothing inappropriate about continuing to chew over the increasingly granular issues about originalism in its various forms and political flavors. But from the standpoint of promoting public acceptance of progressive constitutionalism, progressive academics could more productively invest in enriching the growing body of scholarship that documents the design of the Framers of the Declaration of Independence, the 1789 Constitution, and its subsequent amendments, to create an enduring charter for effective, responsive, and compassionate governance.

¹⁷² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Stevens, J., dissenting) (“It is my firm conviction that no Member of the Court I joined in 1975 would have agreed with today's decision.”).

¹⁷³ *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010). For detail on how these decisions nullify interpretations of the Commerce, General Welfare (tax-and-spend), Necessary and Proper, and Due Process Clauses, see, among many other sources, Lazarus, *supra* note 14, at 11–20.

¹⁷⁴ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

3. *Demonstrate the Drastic Consequences of Constitutional Retreat*

Embracing the civics class canon will give progressive advocates an idiom intelligible to real-world audiences. But it won't make the sale. To do that, progressives must prove that the war over the courts and the Constitution matters—to those audiences, not just themselves. They will have to demonstrate the common interests and ideals that will be lost if a conservative activist judiciary rewrites the Constitution and laws to, for example, put affordable health care beyond the reach of people with cancer or high blood pressure, leave the nation's democratic institutions defenseless against inundation by corporate cash, or dismantle the network constructed during the twentieth century of essential statutory protections for consumers, workers, retirees, minorities, women, people with disabilities, people living in and trying to surmount poverty, and the environment.

This is a challenge shared by all progressives, not just those whose primary concern is the courts. As made clear by the ACA legal challenges and the Tea Party's broader drive to demonize and eviscerate government, a new imperative for progressives is to regenerate public appreciation for the social contract underlying post-New Deal interpretation of the Constitution. Court-focused progressives have significant value to add to this enterprise. Fights over broad Congressional authority to implement the post-New Deal social contract, and for faithful judicial enforcement of specific laws exercising that authority, provide unique platforms for reselling the hard-won legal protections that have for decades been taken for granted, as well as the constitutional regime that made it possible to enact those protections.

These battles must be fought simultaneously in the media, in legislatures, and elections, as well as in the courts. When, minutes after President Obama signed the health reform law, fourteen (now twenty-seven) Republican state attorneys general and governors asked federal courts in Florida and Virginia to declare the law's mandatory insurance requirement unconstitutional, even conservative legal experts scoffed. Reagan Administration Solicitor General and Harvard law professor Charles Fried called the attacks legally "preposterous."¹⁷⁵ George Washington University professor Orin Kerr, who counseled Texas Republican Senator John Cornyn on Justice Sonia Sotomayor's confirmation proceedings in 2009, gave challengers a "less than 1 percent chance" of success.¹⁷⁶ Opponents responded massively in media and political arenas as well as the courts. They did not frontally challenge the nearly

¹⁷⁵ In discussing the ACA lawsuits, Fried stated: "Anybody who proposes something like this is either ignorant—I mean, deeply ignorant—or just grandstanding in a preposterous way." *'This Week' Transcript: WH Sr. Advisor Valerie Jarret*, ABC THIS WEEK (Mar. 28, 2010), <http://abcnews.go.com/ThisWeek/week-transcript-wh-sr-adviser-valerie-jarrett/story?id=10210079&page=5>.

¹⁷⁶ See Simon Lazarus, Op-Ed., *Framing the Debate over Health Reform*, NEWSWEEK (Oct. 4, 2010, 5:00 PM), <http://www.thedailybeast.com/newsweek/2010/10/04/opinion-conservatives-mislead-in-health-debate.html>.

unanimous expert verdict that the reform law's "individual mandate" to purchase insurance passes muster with governing Supreme Court precedent. Instead, they have aimed at sowing doubt about whether, if indeed the experts are right about constitutional law as it stands, perhaps existing law gives the federal government too much power. Toward this end, opponents have honed a set of core buzz-words and messages, designed to reframe the debate, and gradually shift the political and legal consensus. Over and over, in all fora, ACA opponents have fired off the same talking points: that the individual mandate is an "unprecedented" and drastic curtailment of individual liberty; that it uniquely regulates "inactivity," as opposed to "activity"—the "doing of nothing at all," and that it "compels" people to "buy a commercial product," hence putting the law on a slippery slope and empowering Congress to require all Americans to buy General Motors cars, nutritious vegetables ("broccoli"), or health club subscriptions. This parade of horrors, repeated endlessly by conservative bloggers, editorial writers, and politicians, pop up *verbatim* in the briefs of ACA challengers and the opinions of the judges who have ruled against the mandate.

As of this writing, just one Republican judicial appointee, Sixth Circuit Judge Jeffrey Sutton, has rejected opponents' message points and their invitation to replace existing law with their libertarian model. Voting with Jimmy Carter-appointee Judge Boyce Martin to uphold the mandate, Sutton recognized that "existing precedents support the government," observing that only the Supreme Court could overturn or revise those precedents.¹⁷⁷ By the time the ACA challenges reach the Supreme Court, reform opponents hope their propaganda network will have so saturated public discourse that the conservative justices will feel empowered, perhaps pressured, to reject Judge

¹⁷⁷ See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J., concurring in part). For a summary of how thoroughly Judge Sutton dissected the message fabric ACA opponents developed to offset the weakness of the case under existing law, see Simon Lazarus, *Potent Support for the Affordable Care Act Mandate from an Improbable Source*, AM. CONST. SOC'Y BLOG (June 30, 2011), <http://www.acslaw.org/acsblog/potent-support-for-the-affordable-care-act-mandate-from-an-improbable-source>. In addition to George W. Bush-appointee Sutton in the Sixth Circuit, in the Eleventh Circuit ACA litigation, Judge Stanley Marcus, who received his appellate appointment from Democratic President Bill Clinton but who had previously served as a district judge as a result of an appointment by Republican President Ronald Reagan, also voted to uphold the mandate on the basis of reasoning similar to Sutton's. See *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1330 (Marcus, J., concurring in part and dissenting in part). Two other prominent Republican members of the District of Columbia Circuit, Judge Brett Kavanaugh and Senior Judge Lawrence Silberman, appeared skeptical of major elements of the ACA opponents' libertarian catechism during oral argument the ACA challenge pending in that circuit. See Simon Lazarus, *In Under-Reported D.C. Circuit Oral Argument, Prominent Republican Judges Suggest Novel Arguments for Upholding Health Care Law's Individual Mandate*, AM. CONST. SOC'Y BLOG (Sept. 26, 2011), <http://www.acslaw.org/acsblog/in-under-reported-dc-circuit-oral-argument-prominent-republican-judges-suggest-novel-argumen>.

Sutton's fidelity to precedent, along with his admonition that "the policy strengths and weaknesses of . . . the individual mandate as part of this national legislation . . . [should be resolved by the] peoples' political representatives, rather than their judges."¹⁷⁸

Progressives are unlikely to beat conservatives' full court press, unless they effectively counter it. At this point, it is by no means certain that they will. The Obama Administration and its allies do appear to have convinced a majority of the public that specific features of the ACA are valuable, such, for example, as the law's insurance reforms that will, as of 2014, forbid insurers from rejecting or charging applicants on the basis of their health status or, specifically, pre-existing medical conditions. But they have not been able to—indeed, have not devoted significant resources to attempting to—demonstrate that preserving the mandate is essential for preserving pre-existing conditions protection.¹⁷⁹

In sum, in this period, with longstanding fundamental requisites of progressive constitutionalism and progressive governance at grave risk, Justice Breyer's emphasis on stressing practical "consequences" in constitutional and statutory interpretation, is not an option for progressives. It is indispensable. Such arguments must be deployed on all fronts—politics, the media, as well as the courts. They must be persuasive, coordinated, harmonized, tailored to target constituencies and audiences, and shaped to fit the respective arenas in which they are used.

V. CONCLUSION

Progressives should relish this challenge as a historic opportunity. The "don't-twist-the-law-to-favor-the-big-guy" message can mean that confirmation battles need no longer be mere annoying distractions from the Democrats' main agenda of middle-class-friendly economic and environmental reform. The new message meshes the war over the courts with that agenda, and with the interests of the constituencies it targets, while sounding in broadly resonant rule of law tones. Conservatives' new drive to reprise *Lochner*-style activism, and many of the specific claims associated with it, open the way for progressives to show that this transparently political exercise would hijack, not restore, the Constitution as written and originally understood, as well as applied during the past eight decades. The requisite arguments can attract support from moderates and even traditional conservatives, such as Judge Sutton,¹⁸⁰ former Fourth

¹⁷⁸ *Thomas More*, 651 F.3d at 566 (Sutton, J., concurring in part). The analysis in this paragraph expands on material from my *Newsweek* article, *Framing the Debate over Health Reform*, *supra* note 176.

¹⁷⁹ States that have attempted to ban exclusions of coverage for people with preexisting conditions without imposing a minimum coverage provision have been unsuccessful. See Brief Amici Curiae of the March of Dimes Foundation et al. in Support of Motion to Dismiss at 5–8, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-cv-00188-HEH), 2010 WL 2661291.

¹⁸⁰ See *Thomas More*, 651 F.3d at 549 (Sutton, J., concurring in part).

Circuit Chief Judge H. Harvie Wilkinson,¹⁸¹ and Judges Alex Kozinski and Michael Boudin.¹⁸² And the practical issues at stake affect the most basic, highest priority needs of virtually all Americans, including many who have long overlooked their stake in courts that ensure government's continued capacity to meet those needs.

¹⁸¹ See, e.g., J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (condemning *District of Columbia v. Heller* and *Roe v. Wade* as equally driven by political agendas rather than applicable constitutional text, history, and precedent); see also Text, *History & Principle: What Our Constitution Means and How to Interpret It*, AM. CONST. SOC'Y (June 18, 2011), <http://www.acslaw.org/news/video/text-history-principle-what-our-constitution-means-and-how-to-interpret-it>.

¹⁸² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, at 27–29 (1st Cir. 2005) (Boudin, C.J., concurring).

